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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1927

## No. 433

CITY OF GAINESVILLE, PETITIONER,

vs.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR OF H. W. HEAD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1927

CERTIORARI GRANTED OCTOBER 31, 1927

(32,885)

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# In the United States Circuit Court of Appeals

FIFTH CIRCUIT.

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**No. .....**

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THE CITY OF GAINESVILLE, PLAINTIFF IN ERROR,

VS.

SOUTHERN CONSTRUCTION CO., ET AL., DEFENDANTS IN ERROR.

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ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

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**Caption.**

Be it remembered, that at a regular term of the United States District Court for the Eastern District of Texas, and the fifth circuit, begun and held in the court room of said court, in the City of Sherman, Texas, and in said district, on Monday, the 17th day of May, A. D. 1926, and which term adjourned on Saturday, the 22nd day of May, A. D. 1926, the Honorable W. L. Estes, United States District Judge for the Eastern District of Texas, presiding, the following proceedings were had, and the following cause came on for trial, and was tried, to-wit:

Style of cause:

*The City of Gainesville,*

vs.

*Southern Construction Co., et al.*

**Plaintiff's Third Amended Original Petition.**

*In the District Court of the United States, for the Eastern District of Texas. At Sherman, Texas.*

*The City of Gainesville,*

vs.

*Southern Construction Co., et al.*

Comes now the City of Gainesville, plaintiff, in the above styled and numbered cause, and by leave of the court first had and obtained, filed this its third amended original petition and for such petition says.

The City of Gainesville, plaintiff complaining of the Southern Construction Company and Harry D. Levy and Lester Levy, doing business under the style and name of the Southern Construction Company and Lester Levy and Harry D. Levy individually, and H. O. Head executor of the estate of H. W. Head, deceased, and the Southern Surety Company, a corporation, and the Brown-Crummer Investment Company, a corporation, defendants, and for cause of action says:

1.

That the plaintiff is a municipal corporation situated in Cooke County, Texas, duly chartered by a special act of the legislature of the State of Texas and approved March 17, 1909, and soon thereafter adopted by the voters of the City of Gainesville, the duly elected, qualified and acting mayor of which is a partnership composed of Harry D. Levy and Lester Levy, whose residence is to the plaintiff unknown and that said Harry D. Levy and Lester Levy were at all times

hereinafter mentioned in business under the style and name of the Southern Construction Company, and that the defendant, the Southern Surety Company is a corporation duly incorporated under the laws of the State of Iowa, but having a permit to do business in the State of Texas and having a local agent representing it, to-wit, John T. Suggs, who resides in the City of Denison in Grayson County, Texas, and on whom service of citation may be had, and that H. O. Head is duly qualified and acting executor of the estate of H. W. Head, deceased, and that said H. O. Head resides in Grayson County, Texas, and that the defendant, the Brown Crummer Investment Company is a corporation duly incorporated under the laws of the State of Kansas but having a permit to do business in Texas and that its agent for service in Texas is C. J. Moore who resides in the City of Dallas in Dallas County, Texas, and on who service of citation may be had.

2.

That the defendant Lester Levy and Harry D. Levy having had citation heretofore served upon each of them herein and that the said Harry D. Levy and Lester Levy have at all times hereinafter mentioned done business under the style and name of Southern Construction Company and that the Southern Surety Company, a corporation, has waived service herein and also answered herein, and that H. W. Head waived service herein and also answered herein, but that the said H. W. Head is dead, having died in the latter part of the year 1921 or the early part of the year 1922,

and that the defendant H. O. Head is now the duly qualified and acting executor of the estate of the said H. W. Head, deceased, and is made a party defendant herein as such, and that the defendant Southern Construction Company has heretofore been served with citation herein and has answered herein.

3.

That heretofore, to-wit, on the 20th day of November, 1919, the plaintiff entered into the contract with the defendant, the Southern Construction Company, under which style and name the defendants, Lester Levy and Harry D. Levy were at all times mentioned doing business, whereby and whereunder the said defendant undertook to do and perform certain street work and paving on certain streets of the city for the plaintiff according to and as shown by said contract and the plans and specification for said paving work and that on the said 20th day of November, 1919, the plaintiff entered into and made with the said construction company a supplemental contract and that on the 16th day of December, 1919, the said council of the plaintiff city by an ordinance duly enacted, passed and adopted by said city council ratified and confirmed the said contract and said supplemental contract and said plans and specification which were fully set forth in the said ordinance adopted by said council on the said 16th day of December, 1919, the said ordinance containing and setting forth the contract and said supplemental contract and said plans and specification being attached and the same being made a part hereof

as though fully set out herein and being marked Exhibit "A."

That the original contract above referred to of date November 20, 1919, provided among other things for the execution of a bond to the City of Gainesville by the defendant the construction company and that said contract set forth that said bond had been executed and had been annexed to said contract but that in truth and in fact no such bond was executed to said city by said construction company, but that instead on said date a supplemental contract was entered into by the plaintiff city and said construction company by which the original contract as to the provisions for the bond was modified and it was provided in said supplemental contract that the said city should issue its warrants in the sum of $50,000.00—in denominations of $1000.00 each and to be designated "City of Gainesville street improvement warrants series" to be dated November 20, 1919, bearing interest at the rate of six per cent per annum said interest payable semi-annually on said dates as should be found advisable by the plaintiff said warrants maturing serially in approximately one to twenty years, said warrants to be issued in payment for labor materials, supervision and so forth furnished by the said construction company in said paving work in consideration of which the said construction company agreed to accept the said warrants in payment for labor, materials and supervisions in doing said paving work on said streets, all of which is fully set forth in said ordinance adopted by the said city

council on the said day of December 16, 1919, and all of which ordinance is hereby expressly made a part of this petition as an exhibit thereto as though fully set forth in the face and body of this petition.

And this plaintiff would further show to the court that it did so issue said warrants in the sum of $50,000.00, in denominations of $1000.00 each numbered from one to fifty due and payable in from one to .... years.

Copy of said warrants being as follows;

United States of America, Number 2, $1000.00.

*State of Texas, County of Cooke.*

City of Gainesville

Street Improvement Warrant
Series A I.

This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to the Southern Construction Company, Contractor, their assigns or bearer, on the first day of March, 1921, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas.

One Thousand Dollars.

in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the first day of March, 192.. and semi-annually thereafter on September 1st and March 1st of each year and the

City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest thereon, evidenced by coupons attached hereto, principal and interest payable at the place above named upon presentation and surrender of warrant or proper coupon.

This Warrant is one of a series of Fifty (50) warrants, numbered consecutively from One (1) to Fifty (50) inclusive, in the denomination of One Thousand Dollars ($1000.00) each aggregating the sum of Fifty Thousand Dollars ($50,000.00), issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to The Southern Construction Company, their assigns or bearer, for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20th, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and laws of the State of Texas, and pursuant to an ordinance passed by the City Council of said City of Gainesville, Texas, on the 16th day of December, 1919, recorded in Book 6, at pages 583, *et seq.* of the Minutes of said City Council.

The date of this warrant, in conformity with the ordinance above mentioned, is November 20th, 1919.

And It Is Hereby Certified and Recited that all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and

due time, form and manner as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation.

In Witness Whereof, the City of Gainesville has caused this corporate seal of said City to be hereto affixed and this warrant to be signed by its Mayor and countersigned by its City Secretary, and registered by the City Treasurer as of the date last above written.

E. N. Blackburn
Mayor, City of Gainesville, Texas.

Countersigned;
S. A. Bryan
City Secretary, City of Gainesville, Texas.

Registered this the 27th day of April, 1920.

R. R. Hulett
City Treasurer, City of Gainesville.

Said warrant further contained the following coupon provisions set forth on the face thereof and that said warrants had on the back of each of them the following assignment and other matter. The said coupon is as follows;

"Number 3, $30.00

On the first day of March 1921.

The City Treasurer of the City of Gainesville, Texas, will pay to the Southern Construction Company, their assigns or bearer, at the offices of The Brown-Crummer Investment Company, Wichita, Kansas, the

sum of Thirty and no-100 Dollars ($30.00), the same being six months' interest due that day on City of Gainesville, Texas, Street improvement Warrant, Series A One, dated November 20th, 1919, and is a part thereof" No. 2.

E. N. Blackburn, Mayor.

S. A. Bryan, City Secretary.

The said assignment appearing on the back of each warrant is as follows;

This Is To Certify that we have received the within principal Paving Warrant, and the interest coupons thereto annexed from the City of Gainesville, Texas, and for value received, we hereby transfer, assign, sell and deliver without recourse, to bearer, all right, title and interest we have in and to the same, and also the proportionate part of said contract price, and the debt due us, with interest thereon, by said City, which is represented by the amount called for by this principal warrant, and the annexed coupons; and the said bearer is hereby subrogated to all claims, liens, right or title, whether in law or in equity, which are or may be secured to us in said contract, and we hereby authorize the bearer hereof to collect the same and give full receipt and acquittance thereof in our name.

The Southern Construction Company,
a partnership,
By Lester Levy
Member of the firm.

Said warrant had on its back the following in addition to the assignment above copied.

United States of America, Number 2, State of Texas County of Cooke City of Gainesville Street Improvement Warrant Series A I. 1000, Per 6 Cent, Dated November 20, 1919. Principal Due, March 1, 1921, Interest Payable September 1 and March 1 payable at the Office of the Brown-Crummer Investment Company, Wichita, Kansas.

The assignment in words and figures as above set forth contained the signed assignment and endorsement of the said construction company. The above copy is an exact copy of warrant number two issued by the plaintiff city under the terms and provisions of the ordinance above referred to, to the Southern Construction Company and under the terms and provisions of the contract and supplemental contract herein above referred to and the specifications and plans under which said paving work was to be done as set forth and incorporated in the ordinance herein above referred to, the warrant which is herein above copied having matured and having been paid to the Brown-Crummer Investment Company by the plaintiff city, both principal and interest, and this plaintiff says that said warrants issued by said city under said ordinance and contracts, is an exact copy of all such warrants, except as to serial number and date of maturity.

4.

That as is shown by the copy of said warrants herein above set forth the plaintiff city, for value received, promised to pay to the Southern Construction

Company, contractor, under said ordinance, contract and supplemental contract plans and specifiations, their assignees or bearer the amount of each of said warrants upon the maturity thereof, with interest at the rate of six per cent per annum payable semi-annually on the first day of March and the first day of September of each year at the offices of the Brown Crummer Investment Company of Wichita, Kansas, defendant herein.

5.

That the defendant Lester Levy and Harry D. Levy doing business under the style and name of the Southern Construction Company, a copartnership composed of said Lester Levy and Harry D. Levy, promised, agreed and undertook to do said paving work according to the plans and specifications as set forth in the ordinance above referred to and by which the plaintiff city ratified and confirmed said contract, to the amount of $50,000.00 and that at some time after passage and adoption of said ordinance and prior to the 20th day of September 1920, the said construction coentered and upon said work and said city paid said construction company $3000.00 in said warrants for paving work done under said contract and that about the said 20th day of September 1920 the said city delivered $10,000.00 of the warrants herein above referred to, to the said construction company, before the work represented by the said warrants had actually been done by the said construction company and that the said H. W. Head, in

order to aid the said construction company in acquiring possession of said $10,000.00 worth of warrants and to aid it in proceeding with said work entered into the following written obligation to the plaintiff city, whereby he undertook to indemnify the plaintiff city in the delivery of said warrants to said construction company and before said work had in fact been done, the said obligation being in words and figures as follows:

Sherman, Texas, September 10th, 1920.

To the City Council,
Gainesville, Texas.

Gentlemen:

By virtue of an order from the Southern Construction Company any monies due said Southern Const. Co., from the City of Gainesville for work done and materials furnished under a contract for street improvements is to be paid to me, said amounts being payable in City Warrants.

I understand it is now the purpose and intent of the City Council of Gainesville, Texas, to have issued to said Southern Const. Co., ten thousand dollars in warrants, these warrants to be properly endorsed by Southern Cons. Co., and delivered to me.

In the event of any dispute, discrepancy or other contingency arising which might in any way affect the amount of work done or materials furnished by Southern Cons. Co. so as to in any way affect said ten thousand dollars in warrants I hereby agree to protect and indemnify said City of Gainesville, Texas, up to the sum of ten thousand dollars.

None of said money will be paid or credited to Southern Cons. Co. except in such amounts as may be shown to be due under signature of Mayor of Gainesville, Texas, and when such amounts shall equal ten thousand dollars then this obligation to be discharged.

In case of suit arising out of the matters set out herein or in case suit becomes necessary to enforce any rights secured hereby, such suit shall be filed in Cooke County, Texas.

H. W. Head.

And this plaintiff would further show to the court that in order to indemnify the plaintiff city and protect it against loss on account of the delivery of said warrants to the said construction company and protect said city against any default on the part of H. W. Head in his undertaking as set forth in the obligation and herein above set out, the defendant Southern Surety Company entered into the following obligation of dated September 20, 1920, the said obligation of Head being attached to and made a part of said obligation of the said Southern Surety Company, which is as follows:

*State of Texas, County of Grayson.*

*Know all men by these presents*: That the Southern Surety Company of Des Moines, Iowa, is held and firmly bound unto the City of Gainesville, Texas, in the sum of fifteen thousand ($15,000.00) dollars, for the payment of which sum said Southern Surety Company hereby binds itself, its successors and assigns.

The condition of the foregoing obligation is such that whereas on the 10th day of September A. D. 1920, H. W. Head of Grayson County, Texas, agreed with the City of Gainesville, Texas, to protect said city of Gainesville, Texas in event of any dispute, discrepancy or other contingency which might arise in the delivering of certain warrants to said H. W. Head, original of said agreement being attached hereto and made a part of this bond.

Now, therefore, if said H. W. Head shall protect and indemnify said City of Gainesville as per terms of said agreement, then this obligation will become null and void; otherwise to remain in full force and effect.

Signed, sealed, and delivered this 20th, day of September, A. D. 1920.

Southern Surety Company,
By Sam Kirkpatrick,
*Attorney in Fact.*

This plaintiff would further show to the court that at some time about the 4th day of October, 1920, the plaintiff city issued and delivered, or obligated itself to deliver to said construction company the balance of said warrants, being $37,000.00, in amount in the denomination of $1000.00 each in payment for the balance of said street paving work to the amount of $50,000.00, which the said construction company as herein above said had agreed to do and perform it, the construction company having prior thereto received in payment for said work the sum of $13,000.00, $3,000.00

of which were paid in warrants and $10,000.00 of which was paid in warrants as above said, and that to indemnify the plaintiff city against loss on account of the delivery to the said construction company by the plaintiff city of said $37,000.00 in its warrants the said H. W. Head entered into the following obligation of date October 4, 1920.

Sherman, Texas, October, 4, 1920.

To the City Council
Gainesville, Texas,

Gentlemen:

By virtue of an order from the Southern Construction Company, any monies due said Southern Construction Company from the City of Gainesville, Texas for work done and materials furnished under a contract for street improvements to be paid to me, said amounts being paid in City Warrants.

I understand that it is now the purpose and intent of the City Council of the City of Gainesville, Texas, to have issued to said Southern Construction Company Thirty Seven Thousand ($37,000.00) dollars in warrants, these warrants to be properly indorsed by the said Southern Construction Company and delivered to me.

In the event of any dispute, discrepancy or other contingency arising which might in any way affect the amount of work done or materials furnished by Southern Construction Company, so as to in any way affect said thirty seven thousand dollars in warrants,

I hereby agree to protect and indemnify said City of Gainesville, Texas, against loss of any character whatsoever, up to the sum of fifty thousand ($50,000.00) dollars.

None of the said monies will be paid to or credited to said Southern Construction Company, except in such amounts as may be shown to be due by estimates duly allowed and signed by the Mayor of Gainesville, Texas and when such amounts shall equal thirty seven thousand ($37,000.00) dollars, then this obligation will be discharged.

In case of suit arising out of the matters set out herein or in case suit becomes necessary to enforce any rights secured here by, such suit shall be filed in Cooke County, Texas.

H. W. Head.

This plaintiff would further show to the court that the Southern Surety Company, defendant, in order to indemnify the plaintiff city against loss on account of the failure of said H. W. Head to perform his agreements herein last above set out entered into the following obligation with the plaintiff city the said last mentioned obligation of said Head being referred to and made a part of the obligation of said surety company which is as follows:

*State of Texas, County of Grayson.*

*Know all men by these presents*: That the Southern Surety Company of Des Moines, Iowa, is held and firmly bound unto the City of Gainesville,

Texas, in the sum of fifty thousand ($50,000.00) dollars, for the payment of which sum said Southern Surety Company hereby binds itself, its successors and assigns.

The condition of the foregoing obligation is such that whereas on the 10th day of September, A. D. 1920, H. W. Head of Grayson County, Texas, agreed with the City of Gainesville, Texas, to protect said City of Gainesville, Texas in event any dispute, discrepancy or other contingency which might arise in the delivering of certain warrants to said W. H. Head, original of said agreement being attached hereto and made a part of this bond.

Now, therefore, if said H. W. Head shall protect and indemnify said City of Gainesville on per terms of said agreement, then this obligation will become null and void; otherwise to remain in full force and effect.

Signed, sealed, and delivered this the 20th day of September, A. D. 1920.

Southern Surety Co.,
By John T. Suggs,
*Attorney in Fact.*

This plaintiff would further show to the court that each and all of the above mentioned warrants were issued by the City of Gainesville under warrant and authority of law and that each and all of said warrants constituted the valid, legal and binding promise and obligation of the plaintiff to pay the full amount of each and all of said warrants both principal

and interest to the Southern Construction Company, or the assignee of the said construction company or any bearer of said warrants, or either of them, and the plaintiff further says that it did issue said warrants to the sum of $47,000.00 payable to the Southern Construction Company their assignees or bearer and that upon execution of the obligation of the said H. W. Head each and all of said warrants were assigned by the said Southern Construction Company, a partnership, by Lester Levy and member of said firm and that said warrants were delivered to the said H. W. Head who in turn sold and delivered each and all of such warrants to the Brown-Crummer Investment Company, defendant and that said Brown Crummer Investment Company, is now the owner and holder of said warrants except 6 of said warrants which have matured and have been paid, both principal and interest to the said Brown-Crummer Investment Company.

7.

This plaintiff would further show to the court that each and all of said warrants are of cash value of the amount of the face thereof, including the matured interest thereon and were at all times of said value and that each and all of said warrants as to the principal and interest thereon constitute the legal, valid and binding obligation and promise of the plaintiff city to pay the same to the bearer or holder thereof, unless same should be held invalid by the court.

8.

This plaintiff would further show to the court that though he paid in warrants the amount of $3000.-00 and in said warrants as above said which constituted its valid, legal and binding promise and obligation to pay additional sum of $47,000.00 or the total of $50,000.00 for work and paving done on its said streets by the said construction company, said amounts being paid in cash and warrants as above said before such work was actually done except as to $3,000.00 of said warrants above said that the said construction company did perform in actual fact only $34,736.29 worth of street paving under said contract and supplemental contract as herein above referred to, and that it failed and refused and still fails and refuses upon the demand of this plaintiff either to do or perform the balance of said work amounting to $15,264.71 or to return to this plaintiff the amount of said warrants in excess of the work so done, which plaintiff alleges to be $15,264.71, and this plaintiff further alleges that upon the failure and refusal of said construction company to do and perform said work or repay the plaintiff the amount of $15,264.71 in excess which had been paid to said construction company or return to the plaintiff $15,264.71 of said warrants, the plaintiff demanded of H. W. Head under the terms of his obligations as above herein set forth to indemnify the plaintiff against loss by the issuance and delivery of such warrants as above said, that he either reimburse the city for the amount of excess so paid

or deliver to the city of said warrants to the amount of $15,264.71, and that said Head above failed and refused the demand of the plaintiff and whereupon it made a like demand of the defendant the Southern Surety Company and that said defendant failed and refused and still fails and refuses to comply with said demand in whole or in part, and for all of which the defendants and each of them, except the defendant Brown-Crummer Investment Company have become and are liable to this plaintiff.

And the plaintiff further says that it made proper and due demand for the other amounts herein alleged to be due it from the said construction company, the said Levy's and the said H. W. Head and the said Southern Surety Company, as due from said construction company to it by reason of the issuance and the delivery to said company of said warrants, and that upon the default of said company, the said Head became liable under and by virtue of his obligations to this plaintiff to pay said amounts, or to return to plaintiff said warrants, but which he failed and refused to pay and failed and refused to deliver to the plaintiff the warrants isued by it in excess of the work done and material furnished, and thereupon plaintiff made its demand of the said surety company under its obligation to, and for which it had become liable to the plaintiff upon the default of said Head, and that said surety company failed and refused to pay said amounts or any part thereof, all of which was to the great damage of the plaintiff.

9.

This plaintiff would further show to the court that the obligations of said Head as above herein set forth were that, among other things; In the event of any disputes, discrepancy or other contingency arising which might in any way affect the amount of work done or materials furnished by the Southern Construction Company so as to in any way affect the said ten thousand of warrants (under the first obligation of date Sept. 10, 1919) or so as to affect the $37,000.00, in warrants (under the obligation of date Oct. 4th, 1919) I hereby agree to protect and indemnify the City of Gainesville, Texas up to the sum of $10,000.00 (under the first obligation) and up to $50,000.00 (under the second obligation of date Oct. 4th, 1920), and that the obligation of the Southern Surety Company was to protect and indemnify the City of Gainesville, Texas, in case of default on the part of said H. W. Head, and in this connection this plaintiff would show to the court that there is an error by way of date in the second obligation of the Southern Surety Company to which is attached the obligation of H. W. Head of date Oct. 4th, 1920, in that said surety company's obligation bears date of Sept. 20, 1920 and refers to an obligation of Head dated Sept. 10, 1920, when the attached obligation of Head which is made a part of said obligation is dated Oct. 4th, 1920, and that the error of date in the surety company's obligation is that it should have been Oct. 20th instead of Sept. 20th, and that it should have made refer-

ence to the date of Head's obligation as of Oct. 4th, 1920 instead of Sept. 10th, 1920 and that it was the intention of said obligation on the part of the surety company to which was attached the obligation of Head of date Oct. 4th, 1920, to cover said obligation of Oct. 4th, 1920, and not the obligation of date Sept. 10, 1920.

10.

This plaintiff would further show to the court that one of the provisions of the said contract and supplemental contract made by the Southern Construction Company with the plaintiff city, was as follows, "The undersigned bidder (meaning the Southern Construction Company) agrees to complete the work upon which it has bid within 180 working days from the acceptance of his bid by the city."

This plaintiff would show to the court that the terms of the said contract to do said paving work, and the supplemental contract both of which were made on the 20th day of Nov. 1919, were adopted and accepted by the plaintiff city on the 16th day of December, 1919, by the enactment, passage and adoption of the ordinance herein above referred to and made a part of this petition as Exhibit "A" and the plaintiff would further show that the said construction company has not completed its paving work under said contracts to exceed the sum of $34,736.29 and that the paving work under said contract even to the extent of $34,736.29 was not completed under the term and provisions of its said contract with the plaintiff until about the 1st day of July, 1921, and the

plaintiff here alleges that one of the provisions of its said contract with the said construction company was that said company would be liable to the plaintiff's city engineer, to-wit, R. G. Caraway Company for each and every working day that said company should use in the performance of its said paving work under said contract in excess of the said 180 days in the sum of $25.00 per day, and the plaintiff further alleges that the time employed by said company in doing said $34,736.29 worth of work was 215 working days in excess of the 180 days, and plaintiff further alleges that on account of the matters and things herein alleged the Southern Construction Company, and Harry D. Levy and Lester Levy became liable and bound to pay the R. G. Caraway Company, the plaintiff's city engineer, the sum of $5357.00 which it further alleges was transferred and sold to plaintiff by said R. G. Caraway Company for a valuable consideration.

The plaintiff would further show to the court that the defendants Southern Surety Company and Harry D. Levy and Lester Levy have become and are liable for said sum, but have failed and refused and still fail and refuse upon demand to pay the same or any part thereof.

11.

Plaintiff further alleges that the defendant Southern Construction Company and the defendants Harry D. Levy and Lester Levy are each further due

the plaintiff the sum of $2793.79 on the following account:

That, in doing said paving work, the plaintiff city furnished to the said construction company 126,300 gallons of water, 1000 gallons of which was furnished at the agreed rate of 50 cents per 1000 feet and 125,300 gallons at the agreed rate of 25 cents per 1000 gallons making a total of $31.83. That the plaintiff also furnished to the said construction company in doing said paving work a truck for a period of 17 days at the agreed price of $170.00, and also furnished said company a grader for one fourth of a day at the agreed price of $3.71 and for engineering fees collected from the property owners under the said contract, which said fees belong to the plaintiff, to the amount of $2583.21, the whole totaling the sum of $2793.79, all of which is long past due and which the defendants construction company and Harry D. & Lester Levy have failed and refused to pay in whole or in part, and for all of which they are liable to the plaintiff.

12.

The plaintiff alleges that the defendants, the Southern Construction Company and Harry D. & Lester Levy, have each and all failed and refused to return to plaintiff on demand the pavement warrants and failed and refused to pay upon the demand of the plaintiff the said sum of $15,264.71, being the excess of the warrants delivered to them by the plaintiff over and above the work actually done under said contract

for paving and that they and each of them have failed and refused and still fail and refuse to pay the damage in the sum of $5375.00 on account of damages for delay in completing the paving work to the extent of $34,736.29, as alleged in paragraph 9, herein above, and for which they are liable to the plaintiff and that said defendants have failed and refused to pay the plaintiff the amount due for the water, the truck, and the grader furnished by the plaintiff in doing said paving work, and that they and each of them have failed and refused to pay the plaintiff the amount of engineering fees $2,588.21, which with the amount for water, use of truck and grader amount to the sum of $2,793.79, and for all of which said defendants are liable, and that on account of all of said items the defendants the said Southern Construction Company and the said Harry D. and Lester Levy have become and are liable in the total sum of $22,963.21, and interest thereon from the 1st day of July, 1921.

13.

The plaintiff alleges that the defendant H. W. Head became and is liable to the plaintiff to return said warrants to it in excess of the paving done or for the payment of the above amounts and that a "dispute, discrepancy or other contingency," did arise which affected the warrants issued and the amount of work to be done by the said construction company, to the damage of the plaintiff, and against which the defendant Head by his said obligations herein above set out obligated himself and became bound to indemnify the city against loss in this:

That there was issued to the said construction company and delivered to it, $3000.00 in warrants and $47,000.00 worth of warrants which constituted the plaintiffs' obligation to pay and which were the legal, valid and binding promises of the plaintiff to pay unless held to be invalid by the court, which said warrants were issued, and said cash paid for paving work to be done under said contract, and which said warrants were assigned by said construction company and delivered to said Head, who in turn delivered and sold the same to the defendant the Brown-Crummer Investment Company, defendant, and received the money therefor and that thereafter the contingency arose under which the said construction company and the defendants Harry D. and Lester Levy failed and refused to do the paving work in excess of $34,736.29 although the plaintiff had paid them in warrants the sum of $50,000.00 and was entitled to that amount of work to be done; that said construction company and said Levys failed and refused to do said paving work beyond the sum of $34,736.29 and failed and refused to return said warrants to the amount of $15,264.71 and failed and refused to repay the city the difference between the amount of work done and the sum of $50,000.00, and failed and refused to return said warrants in excess of the paving work done; that thereupon, and upon said default the obligation of the defendant Head to the plaintiff he became liable to the plaintiff to indemnify it to the extent of $15,264.71 accrued, or return its said bonds in that

amount, and which plaintiff demanded that he would do but which he failed and refused to do, and upon his default, the liability of the defendant the Southern Surety Company accrued to the plaintiff under its obligations herein above set out, and the plaintiff made demand upon it to be indemnified, but it failed and refused to comply with its obligations and still so fails and refuses.

14.

Plaintiff further alleges that a "contingency, dispute and discrepancy" arose within the meaning of the obligation of said Head affecting said warrants and the work to be done, and upon the default of the Southern Construction Company and the defendants Levy, in so far as the amount of the damage arising from delay in performing the paving work as above set out in this:

That the warrants were issued as payment to said construction company in payment of said paving, and that the delay by way of damages accrued, which affected the work to be done, and the warrants issued in payment therefor, and the said construction company and said Levys disputed said amount so due, and took in lieu of said damage payment in said warrants to cover work actually done, and refused to pay said damage upon demand, whereupon the contingency arose which produced the accrual of the liability of said Head upon his said obligations as herein above set out, and upon demand of the said Head to make good the default of said construction company he failed and refused to do so or to indemnify the plaintiff

on said account, and thereupon the obligation of the said Southern Surety Company to the plaintiff by reasons of its obligations herein above set out to make good the default of said Head and indemnify the plaintiff, but that upon demand the said Southern Surety Company failed and refused to make good its obligation and indemnify the plaintiff.

15.

This plaintiff says that as to the sum of $205.54 on account of water furnished the construction company by the plaintiff and on account of truck and grader furnished as above alleged, for which the construction company and said Levys became liable and bound to pay the city, a "contingency, discrepancy and dispute" arose which affected the said warrants and the amount of work to be done, under the terms of the obligations of said H. W. Head, and within the meaning thereof for which he became liable in this: That the construction company and said Levys were to furnish the material, labor and so forth to do said paving work, and pay for the same and the plaintiff furnished the above items for said work, for which it was to receive pay and for which the said defendants refused upon its demand to pay, and upon said default arose the liability of said Head to the plaintiff, as to said items and said amounts, and which he failed and refused to pay or to indemnify the plaintiff for, and upon his default of the said surety company under the obligations made by it as herein above plead, became liable therefor to the plaintiff under its obligations, and upon demand

made upon it by the plaintiff it failed and refused to indemnify the city and thereby defaulted in its obligation to make good the default of the said H. W. Head.

16.

This plaintiff alleges that a "contingency, dispute and discrepancy" within the meaning of the terms of the written obligations of said H. W. Head arose which affected the warrants and the amount of work to be done, upon which said Head became and is liable for the payment of the sum of $2583.21 as engineering fees as above set out in this: That under the contract for paving made by the construction company and said Levys with the plaintiff, the plaintiff's engineer for and on behalf of the plaintiff was to receive said fees, which were by said construction company and said Levys collected, and by them retained, said fees belonging to the plaintiff under said contract and by assignment from the said city engineer, and that upon demand the construction company and said Levys failed and refused to pay, and thereupon the obligation of said H. W. Head accrued, and upon demand by the plaintiff he failed and refused to return said warrants or to indemnify the plaintiff, whereupon arose the obligation of the said surety company to indemnify the city, plaintiff, upon the default of said Head, and upon demand of the plaintiff of said surety company to so indemnify it, it failed and refused so to do.

17.

The plaintiff alleges that by reason of all the matters and things herein above set forth, the defendant

Southern Construction Company and the said Lester Levy and Harry D. Levy became liable and bound to return the warrants to plaintiff to said amount or bound to pay the plaintiff the said sum of $22,963.21 and which they failed and refused and failed to return said warrants and refused to pay, to the great damage of the plaintiff; that upon the failure and refusal of said defendants to so pay, or to return to the plaintiff the amount of warrants issued to and delivered to the said construction company, and which by said construction company and said Levys assigned to and turned over to said H. W. Head and by him sold and delivered to the defendant the Brown-Crummer Investment Company, and for which the said Head received payment a contingency, within the meaning of the obligation of said Head arose, which affected the amount of work done by the said construction company under its contract with the plaintiff, and the materials furnished by the Southern Construction Company so as to affect and did affect the warrants so issued by the plaintiff as herein above set out, and the obligation of the said Head to indemnify the plaintiff accrued, and whereupon the plaintiff made demand of said Head to either indemnify it by reimbursing it to the extent of said amount of $15,000 worth of warrants and the other sums hereinabove set out, or to return to it warrants to said amount, and that said Head failed and refused to indemnify the plaintiff or return said warrants, or any part of them, to the great damage of the plaintiff, whereupon the plaintiff made demand of the de-

fendant surety company to make good the default of said Head, which it failed and refused to do.

18.

This plaintiff would further show to the court that the defendant H. W. Head was further liable to the plaintiff for all the amounts above set forth, and upon his default, the Southern Surety Company became liable to the plaintiff therefor, on the following account, in addition to the matters and grounds of liability to the plaintiff herein above set out: That at the time said $10,000.00 worth of warrants were issued to the said construction company and at the time the $37,000.00 worth of warrants were issued to said company and at the time of the making of his obligations to the city, plaintiff, of date Sept. 10, 1920, and Oct. 4, 1920, respectively by the said Head to indemnify the plaintiff, the said Head was in truth and in fact a partner of the said Harry D. Levy and said Lester Levy and was sharing the profits with them in said contract with the plaintiff and was a full partner with them, doing business under the style and name of the Southern Construction Company, and this plaintiff further alleged that said Head had at all times herein mentioned a full, complete and accurate knowledge of the manner in which the said paving work was to be done and was done and had a full and complete knowledge of the conditions under which said warrants were issued to and delivered to the said construction company, and had a full and complete knowledge of the purpose for which the same was done and had a full and complete

knowledge of the fact that said warrants were so issued and delivered to said construction company before half the said paving work was done by said construction company, and that said Head well knew, and the plaintiff here alleges the fact to be that the real and intended meaning of the said obligations of the said Head to it as hereinabove set forth, was to protect and indemnify it in delivering said warrants to said construction company before said work was actually done, in the event that said construction company did not do the $50,000.00 worth of work for which it had been half paid, and that said Head well knew that it was his purpose and the purpose of his associates, the said Harry D. Levy and Lester Levy doing business under the style and name of the Southern Construction Company, to get possession of said warrants and sell them, and they did sell them, and use the proceeds thereof to finance themselves in the doing of said paving work for the plaintiff and receive and divide among themselves the profits thereof.

19.

The plaintiff further alleges, that as hereinabove set out the plaintiff city issued its said warrants as is herein alleged, payable as is herein alleged and that to-wit, on or about the .... day of ..... 1921 and prior to the filing of this suit it was agreed by and between the plaintiff, the defendant Head, the defendant Southern Construction Company and the said Lester Levy and Harry D. Levy that the amount of work done by the said Southern Construction Company for the

said city, plaintiff, amounted to the sum of $34,736.29, for and on account of which said warrants were issued by the plaintiff and delivered as herein before alleged, and that there remained at that time due and owing said city in work or money the value of or the amount of $15,264.71 on the account of the issuance and delivering of said warrants, and plaintiff alleges that it was agreed at the said time by and between said parties that after a full investigation by all of said parties of the amount of work that had been done under the said contract by the said Southern Construction Company for the plaintiff city and after a full check of all the figures available and connected therewith, that there was still due and owing said city the said sum of $15,264.71, and that said sum was owing and unpaid and constituted a liability in favor of the plaintiff city for said sum of money or the equivalent thereof in paying money or the return of warrants to said amount to it, and for all of which it was agreed and understood that the said Southern Construction Company and the said Head, as is herein above alleged, and his surety the Southern Surety Company was liable.

And that it was agreed and understood by all parties, the said Harry D. Levy and Lester Levy and the said H. W. Head for himself and as attorney for the said Southern Surety Company, that said amount of $15,264.71 was due said city, plaintiff, as being the amount represented by the dif-

ference between the paving work done and the amount of warrants issued and delivered to the said Construction Company and by it delivered to said Head and to which extent the said Head and the said Southern Construction Company were both and each liable to the plaintiff city, and said amount was fully agreed upon and accepted by all parties thereto, that the said obligation to the plaintiff city, could and would be settled either by the return of the said warrants issued as above said to that amount or by the payment of that amount to the city in cash. That said settlement as to said amount and to said extent was fully agreed upon by said parties thereto at said time and was fully accepted by all parties at said time, and the plaintiff here now pleads said agreement and settlement as binding upon all parties thereto as to the amount of paving work actually done, and as to the amount of warrants to which it is entitled by way of return and the amount of money in lieu of said warrants to which it is entitled in settlement and satisfaction of its claim against said H. W. Head or his estate and the said Southern Surety Company.

And this plaintiff would further show to the court that, since the agreement and understanding was had and made as herein alleged, no further work has been done for this plaintiff under said contract and no money has been paid to it by either of the defendants toward the liquidation of said sum of money due and owing it. And plaintiff further al-

leges that there is now due and owing it on account of the matters and things therein alleged by the defendant Head, and his surety the defendant the Southern Surety Company and the other defendants herein, except the Brown-Crummer Investment Company the said sum of $15,264.71, and for all of which the said defendants have become and are liable, together with interest on said sum from the first day of October, 1921 at the rate of 6 per cent per annum, for all of which this plaintiff sues and asks judgment.

This plaintiff would further show to the court that since the 10th day of March, 1924 the said defendant the Brown-Crummer Investment Company has claimed and admitted that it is the owner of the said unpaid warrants so issued by the plaintiff city as hereinabove alleged and that it has on numerous occasions since that date demanded of the plaintiff city the payment of the interest which is alleged and claimed to be past due said warrants and has undertaken to collect the said interest as the owner of said warrants and entitled to the interest payment thereon, and this plaintiff here and now alleges the fact to be that the Brown-Crummer Investment Company is the present legal and equitable owner and holder of said warrants and is entitled to receive the interest payments thereon if it should be held and adjudged by the court that said warrants are valid and binding obligations upon the city to pay, and the plaintiff further alleges that it fears that

during the pendency of this suit the Brown-Crummer Investment Company will dispose of said warrants or part with its title thereto, to the great injury and damage of this plaintiff, and against which threatened damage it has no adequate remedy at law, unless restrained from so doing by proper order of this court. And in this connection, plaintiff would further show to the court that at the time it purchased said warrants and received delivery of the same and prior thereto, and at all times herein mentioned the said defendant, the said Brown-Crummer Investment Company, had and possessed a full and complete knowledge of all the proceedings had and done by the plaintiff city and its council with reference to the said paving contract hereinabove mentioned and with reference to all the proceedings had and done by the plaintiff city in the issuance of its said warrants and the manner of their issuance and of all the circumstances and facts connected therewith.

And this plaintiff further alleges and shows that by the original answer of the defendant, the Brown-Crummer Investment Co. filed in the District Court of Cooke County, Texas on the 21st day of January, 1924, it plead (1st) by general demurrer, (2) by special exceptions numbers one and two and (3) by general denial and (4) by general and specific denial in which was included a plea of disclaimer in the following language, to-wit:

"This defendant further says that it was not at the time of the filing of this suit and is not now

the owner of any of the warrants and is without knowledge of the ownership of said warrants or any of them or the coupons attached thereto or detached therefrom, that in all payments heretofore made by the City of Gainesville to this defendant on the principal and interest of said warrants were made to it as fiscal agent of the City of Gainesville and only such funds were paid by it as such fiscal agent of said City of Gainesville to the owners of said owners and holders of said warrants, and interest coupons, who presented same to the office of the Brown-Crummer Investment Company, at which office warrants and interest coupons were made payable:

That this defendant had no other or further interest in said warrants or interest coupons than to submit the same to the said treasurer or plaintiff for payment and to receive payment from the city of said warrants and interest coupons for the owners and holders thereof."

That at the January term, 1924 of the said Cooke County District Court said cause came on to be heard and it was agreed by and between all parties thereto that said case should be continued with the understanding that in order to avoid the expense to the defendant, the Brown-Crummer Investment Company and the inconvenience of bringing from Kansas City, Mo. a witness in its behalf to testify under the disclaimer above set forth, and which was to be presented on the trial of the merits of the case, it was agreed that said witness might then testify fully

and this testimony should be taken with the understanding that it could be used upon the trial of the case as tho the witnesses were present then to testify. And said testimony was so taken and said witness testified in substance under said disclaimer that the said Brown-Crummer Investment Company did not at said time nor at the time of filing of the suit, own said warrants or any part thereof, and that the court thereafter and without knowledge of the plaintiff and upon said testimony entered an order dismissing the said Brown-Crummer Investment Company from said suit and that thereafter the said Brown-Crummer Investment Company in the face of the testimony offered under oath by its witness as above said admitted to the plaintiff that it did own said warrants and all of them and had so owned all of said warrants every since they were sold to it by the said Head, and this plaintiff further shows to the court that when it by amended petition in the District Court of Cooke County reimpleaded the said Brown-Crummer Company upon its ownership of said warrants and on its admission of the fact it then filed a petition in said court for the removal of said cause to the United States District Court for the Eastern District of Texas, and in said sworn application or petition admitted that it was the owner of all of said warrants and by its plea now before this court admits that it is the owner of all of said warrants.

Wherefore the plaintiff says that the said Brown-Crummer Company is now stopped to set up the plea

of *res adjudicata* on account of the order improvidently entered by the District Court of Cooke County and recorded in Volume 15, page 58 of the Civil Minutes of said court.

21.

Plaintiff further says that at the time of the filing of this suit and that all times since and at this time the said H. D. Levy, the said Lester Levy and the said Southern Construction Company have been, both, each and all of them, and now are wholly and notoriously insolvent.

22.

This plaintiff further says that on the 4th day of October, 1921 the plaintiff procured a judgment against the defendant H. W. Head and the Southern Surety Company and the Southern Construction Company, a partnership composed of Harry D. Levy and Lester Levy, jointly and severally in the sum of $15,000.00 with interest from that date at the rate of 6% per annum, and that on said date the plaintiff recovered of said construction company, a partnership composed of Harry D. and Lester Levy the further sum of $9435.00 with interest thereon. That the defendants H. W. Head and Southern Surety Company appealed from a judgment or order refusing to vacate said judgment, and that the Court of Civil Appeals for the 6th District reversed said judgment as to said Head and said surety company and remanded this cause for a new trial, but left said judgment

undisturbed as to the other defendants. And in this connection this plaintiff would show to the court that upon said appeal the said appealing defendants plead, among other things, in substance, which were not adjudicated by the judgment of the said Court of Appeals, that the warrants issued by the plaintiff and delivered to the construction company and by it delivered to Head and by said Head sold and delivered to the defendant the Brown-Crummer Investment Company were not valid, legal obligations on the part of the city to pay and that said warrants were void and unenforceable against this plaintiff, and that it therefore had no cause of action against the said Head and said surety company because it had suffered no loss by the issuance and the delivery of said warrants.

23.

This plaintiff further pleads in the alternative that if it be true, that said warrants are void, and the court should so hold, then the plaintiff prays that the said warrants be cancelled and declared void by the court and in this connection this plaintiff says that some of said warrants have already matured and have been paid to the said Brown-Crummer Investment Company, the present owner and holder of said warrants, plaintiff having paid all the said warrants that have so matured both principal and interest and that it has also paid all the matured interest on all of said warrants to this time, and in addition to having

said warrants declared void, this plaintiff prays for judgment against the said Brown-Crummer Investment Company for all the amounts that it has paid to said company on said warrants by way of both principal and interest, and in this connection asks for all such relief to which it may be entitled.

24.

The plaintiff says that since the judgment in this cause was rendered on the 4th day of October, 1921, the said H. W. Head has died and that the defendant H. O. Head is the executor of the estate of said H. W. Head deceased, and that said estate is liable for all the obligations of the said H. W. Head as herein above set forth and plead.

25.

This plaintiff further says that the said Southern Construction Company and the said Harry D. Levy and Lester Levy doing business under the style and name of Southern Construction Company, and the said Harry D. and Lester Levy, individually, are each and all notoriously insolvent and it further says that the residence of the said Levys is now outside the State of Texas.

26.

The plaintiff pleads that it already had judgment against the Southern Construction Company, a partnership composed of Harry D. and Lester Levy, and against the said Harry D. and said Lester Levy individually, but if it be mistaken in its allegation that

it has judgment for the amounts herein sued for against the said Lester Levy and Harry D. Levy, individually and jointly and severally, then it says that both and each of them have been served with citation herein individually, and it prays for such judgment against both and each of them to which it may be entitled.

27.

The plaintiff would further show to the court that upon account of the matters and things herein alleged, there arose such a dispute, discrepancy and contingency as affected the amount of work to be done and the materials to be furnished by the said construction company under its said contract for paving work with the plaintiff so as to affect and did affect the said warrants issued by the plaintiff and delivered to the construction company and by it assigned and delivered to said H. W. Head, and by him sold and delivered to the defendant Brown-Crummer Investment Company, defendant, and for which the said Head received payment because and for the reason, that, within the meaning of the obligations of said Head to the plaintiff as herein above set forth and within the meaning and contemplation of the parties thereto, the obligation of said Head was, in substance and effect and meaning, contemplation and import, to indemnify the plaintiff against loss on account of the delivery of the said warrants to the construction company for the paving work to be done, before the same was actually done, in the event that the said

construction company should fail or refuse to do the amount of work under said paving contract and in the way and manner and within the time provided equal to the value of the said bonds at their par value, and which this plaintiff alleges that the said construction company did fail and refuse to do the extent of $15,264.71, and that the said Head and the said surety company both and each in turn became liable to the plaintiff therefor and which both and each of them failed and refused to make good, either by a return of said warrants or by payment in cash and this plaintiff further says that both the said Head and the said surety company became liable to this plaintiff for the other sums herein above mentioned upon the default of the said construction company and the said Levys, and that the said Head defaulted upon the demand of the plaintiff to fulfill his obligations to it and that the said surety company defaulted in its obligations to the plaintiff upon its demand upon the default of the said Head, and that each and all of the defendants herein named with the exception of the Brown-Crummer Investment Company, have become and are liable to the plaintiff for the amounts herein above set forth.

28.

Wherefore, for each and all the above reasons, the plaintiff says that the defendants Harry D. Levy and Lester Levy and H. O. Head, executor of the estate of H. W. Head deceasel, and the Southern Surety Company, are each and all liable to it for the

said sums herein above set forth, and which they and each of them have failed and refused to pay to the great damage of the plaintiff in the sum of $22,963.21 and for which the plaintiff asks judgment.

This plaintiff would further show to the court that the defendant, Brown-Crummer Investment Company is a Kansas Corporation, but has an agent in the State of Texas on whom service of citation may be had and that it fears that during the pendency of this suit the said defendant will sell, transfer or dispose of said warrants to some person or corporation not a citizen of this state and upon whom no service of citation could be had, or dispose of said warrants to various and numerous corporations or parties widely scattered over the United States, which would greatly delay if not entirely prevent a proper adjudication of its rights as herein alleged as to the cancellation of said warrants, and against which it has no adequate remedy at law.

Wherefore, as to the said Brown-Crummer Investment Company, defendant, plaintiff prays that it be enjoined and restrained from selling, conveying or assigning said warrants or any of them, during the pendency of this suit, and for such other restraining order as will protect the interest of the plaintiff herein with respect thereto.

Wherefore the plaintiff says that the defendant, Southern Construction Company, has answered herein and judgment having been rendered against it in the Cooke County District Court and that the defend-

ant Harry D. and Lester Levy have been served a citation herein and that the Southern Surety Company have waived service and answered herein, and that H. O. Head executor of the estate of H. W. Head, deceased and the Brown-Crummer Investment Company both and each have answered herein, it therefore upon final hearing prays that it have judgment against each of the defendants, jointly and severally for the return to it of warrants issued by the plaintiff as hereinbefore set forth, to the amount of $15,-264.71, and in the alternate if said warrants or bonds cannot be returned to it or the defendants fail or refuse to return the bonds or warrants of said amount, then it prays that it have judgment for the said amount of $15,264.71, as to each and all the said defendants jointly and severally except the said Brown-Crummer Investment Company in the alternate it prays that it have judgment against the Brown-Crummer Investment Company, declaring all of said warrants or bonds invalid and void, and that it have judgment cancelling the same and that it have further judgment against it for all amounts and sums paid to it on account of said warrants by way of both principal and interest and plaintiff further prays for both amounts and for general and special relief as to all of the defendants, both in law and in equity to which it may be entitled, and for cost of suit.

W. L. Blanton,
W. L. Moore,
*Attorneys for Plaintiff, City of Gainesville, Texas.*

I, W. L. Blanton, on oath state that I am city attorney of the City of Gainesville and that the matters and things set forth and alleged in the above amended petition are true.

W. L. Blanton,

Sworn to before me this 16th day of Feby 1926.
(Seal) .....
Notary Public, Cook County, Texas.

EXHIBIT A.

City Hall.
City of Gainesville, Texas.
December 16th, 1919.

The City Council of the City of Gainesvill, Texas, met in regular session, at the City Hall, in said City, on this the 16th day of December, A. D. 1919.

Present:

E. N. Blackburn Mayor.
Geo. A. Beck
J. A. Thomas
J. E. Bramble
C. M. Buckingham
W. B. Nowell
Lee Lewis
J. W. Puckett Aldermen.
R. L. Kendall

and S. A. Bryan, City Secretary.

Absent: None.

a quorum was announced present, when the following proceedings, among others, were had, to-wit:

The Mayor presented to the Council, for consideration and passage and ordinance entitled—"An

ordinance confirming contract between the City of Gainesville and the Southern Construction Company a co-partnership, contractor, for the furnishing of the necessary materials, machinery and labor for constructing certain street improvements in and for the City of Gainesville Texas, in accordance with proposal of contract and plans signed by both parties thereto and made a part thereof: Providing for the issuance of City of Gainesville street improvement warrants as evidence of the city's debt therefor: Providing for the levy of a tax to pay the interest thereon and create a sinking fund for its redemption at maturity: And declaring and emergency."

Moved by Alderman Robbins, seconded by Alderman Beck, that the ordinance be read in full, motion carried and the ordinance was read by the secretary.

Moved by Alderman Robbins, seconded by Alderman Beck, that the ordinance pass its first reading.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Moved by Alderman Robbins, seconded by Alderman Beck, that the rule requiring ordinances to be passed at three several meetings of the City Council be suspended and that said ordinance pass its second and final reading by caption.

Ayes: Alderman, Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Said ordinance was read second time, by caption, and passed by the following vote:

Ayes: Alderman Beck, Thomas Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Moved by Alderman Robbins, seconded by Alderman Beck, that said ordinance be placed upon its third and final passage.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Moved by Alderman Robbins, seconded by Alderman Beck, that the ordinance be finally passed.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

The ordinance as follows:

"An ordinance confirming contract between the City of Gainesville and the Southern Construction Company, a co-partnership, contractor, for the furnishing of the necessary materials, machinery and labor for constructing certain street improvements in and for the City of Gainesville, Texas, in accordance with proposal of contractor and plans signed by both parties thereto and make part thereof: Provided for the issuance of City of Gainesville street improvement warrants as evidence of the city's best therefor:

Providing for the levy of a tax to pay the interest thereon and create a sinking fund for its redemption at maturity: And declaring an emergency:"

Whereas, the city council of the City of Gainesville, Texas, has heretofore determined the necessity for the construction of certain street improvements and the city council, and the City of Gainesville, pursuant thereto, on the 20th day of November, 1919, acting by and through its mayor and city secretary and the said Southern Construction Company, a copartnership, contractor, entered into contract for the construction of said street improvements in accordance with plans, specifications, and proposal which are attached to and form a part of said contract, which is in words and figures as follows, to-wit:

Proposal.

To the City of Gainesville, Texas
Gentlemen:

Pursuant to the foregoing instructions to the bidders the undersigned bidder proposes to do all the work furnish all the material upon which he bids, as provided by the attached plans and specifications, and binds himself on acceptance of his proposal to execute a contract and bond, according to the attached forms, for the performance and completion of the said work in the time specified.

| Items—Written Price | Figures |
|---|---|
| Price per sq. yd. for 3" vertical Fiber Brick pavement complete on a 5" concrete foundation—Three and 40/100 Dollars. | 3.40 |

| | |
|---|---|
| Price per sq. yd. for 3″ vertical Fiber Brick pavement complete on a 4″ concrete foundation—Three and 20/100 Dollars. | 3.20 |
| Price per sq. yd. for 2½″ vertical Fiber Brick pavement complete on a 5″ concrete foundation—Three and 25/100 Dollars. | 3.25 |
| Price per sq. yd. for 2½″ vertical Fiber Brick pavement complete on a 4″ concrete foundation—Three and 05/100 Dollars, | $ 3.05 |
| Price per sq. yd. for Tarvia treatment pavement complete on a 6″ gravel foundation —One and 23/100 Dollars, | 1.23 |
| Price per lin. ft. for stone concrete comb. curb and gutter—Eighty Cents | .80 |
| Price per lin. ft. for gravel concrete comb. curb and gutter—Seventy five cents | .75 |
| Price per lin. ft. for stone concrete comb. curb and gutter—Eighty Cents | .80 |
| Price per lin. ft. for gravel concrete separate curb—Fifty Five Cents | .55 |
| Price per lin. ft. for stone concrete separate curb—Sixty Eight Cents | .68 |
| Price per lin. ft. for gravel concrete separate gutter—Forty Eight Cents | .48 |
| Price per lin. ft. for stone concrete separate gutter—Fifty Seven Cents | .57 |
| Price per lin. ft. for stone separate curb —Forty Five Cents | .45 |
| Price per lin. ft. for oak headers in place—Fifty Cents | .50 |
| Price per cu. yd. for concrete in Culverts, etc. —Eighteen Dollars | 18.00 |
| Price per lb. for reinforcing steel in Culverts, etc.—Thirty Five Cents | .35 |

| | |
|---|---|
| Price per cu. yd. for earth excavation—Seventy Five Cents | .75 |
| Price per cu. yd. for rock excavation—Three Dollars | 3.00 |
| Price per cu. yd. for over haul per 100 ft. —Two cents | .02 |
| Price per pound for Culvert plates—Twenty Five Cents | .25 |
| Price each for Catch Basins complete in place —Fifty Five Dollars | 55.00 |
| Price per sq. ft. for four inch cement walk —Twenty Three Cents | .23 |
| Cost per day for common labor on extra work—Four Dollars | 4.00 |
| Cost per day for team labor on extra work —Seven Dollars | 7.00 |

The undersigned bidder agrees to accept deferred payments on contracts with property owners in One (1) and Two (2) years, and to charge interest on the same at the reate of Eight (8) per cent per annum.

The undersigned bidder agrees to complete the work upon which he has bid, within One Hundred Eighty (180) working days, from acceptance of his bond by the City.

Southern Construction Company
By Harry D. Levy,
Dallas Texas.

Contract.

*The State of Texas, County of Cooke:*

This agreement made and entered into this the 20th day of November, A. D. 1919, by and between the

City of Gainesville. Cooke County, Texas, party of the first part, hereinafter called the City, and the Southern Construction Company, of Dallas, Texas, party of the second part, hereinafter called the Contractor.

Witnesseth: That for in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the said party of the first part, and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed, the said party of the second part agrees with the said party of the first part to commence and complete the construction of certain street improvements and all extra work in connection therewith as stated in the General Specifications, and at his own proper cost and expense to furnish all tools, materials, machinery labor, supervision and other accessories necessary for the said construction in accordance with the conditions and prices stated in the proposal attached hereto, and in accordance with the plans and specifications therefor as signed by the parties hereto, all of which are made a part hereof, and all in the manner and under the conditions hereinafter specified:

All the provisions of this agreement shall be performed in the City of Gainesville, Texas, and any suit to enforce its provisions or for damages for breach thereof shall be brought in Cooke County, Texas.

In witness whereof, the City has caused its seal to be hereto affixed, and these presents to be signed by its Mayor and attested by its City Secretary, and the Party of the Second part have hereto set their hands

and seal on the day, month and year first above mentioned.

Attest:

S. A. Bryan
City Secretary.

The City of Gainesville, Texas,
Party of the first part.
By E. N. Blackburn, Mayor.
The Southern Construction Company,

Witness:
R. G. Carraway.

Party of the second part.

Supplemental Contract.

*The State of Texas, County of Cooke:*

*Know All Men By These Presents:*

That, whereas, under date of November 20th, 1919, a contract was made by and between the City of Gainesville, Cooke County, Texas, and the Southern Construction Company, a co-partnership composed of Harry D. Levy and Lester Levy, of the State of Texas and County of Dallas; providing for certain street improvements to be made by said Southern Construction Company for said City of Gainesville, which contract is duly of record in the Minutes of the City Council; and

Whereas, on the same date a supplemental contract was made by and between said parties, authorizing a modification of the provisions for a bond in said contract, which supplemental contract is also duly of record in the minutes of said city council; and

Whereas, said contract provides for payments to be made in money by said City of Gainesville for said labor, materials and supervision; and

Whereas, it now appears to all parties that the City of Gainesville will not have funds in money available for said purpose, as payments shall become due;

Now, therefore, for and in consideration of the extension of the maturities in the payments for said labor, materials and supervision, the said City herrby agrees to issue in payment for said labor, materials and supervision interest bearing warrants, to be designated "City of Gainesville Street Improvement Warrants, Series .....," to be dated November 20th, 1919, bearing interest at the rate of six per cent (6%) per annum, interest payable semi-annually on such dates as may be found advisable by said City, maturing serially in approximately one (1) to twenty (20) years; and

Whereas, in consideration of the interest to be paid on said warrants, which is hereby made a part of the contract price, the Southern Construction Company has agreed to accept said warrants in payment for said labor, materials and supervision, said warrants to be issued upon the completion of said contract or upon legally approved estimates;

Now, therefore, it is hereby agreed that the payments under the terms of this contract shall be made as herein specified and said city, through its duly authorized officials, binds itself to issue legal warranrs for said purpose.

In witness whereof, we have hereunto set our hands and seals this the 20th day of November, 1919. Executed in duplicate.

The City of Gainesville, Texas.
By E. N. Blackburn, Mayor.

The Southern Construction Company.
By Harry D. Levy,
Lester Levy.

Attest:
S. A. Bryan,
City Secretary.

And, whereas, said contract, and supplements thereto is based upon specifications prepared and submitted to and approved by the mayor and city council, and was let and entered into after proper advertisement inviting competitive bids for the work proposed to be done, which advertisement is as follows:

Notice to Paving Contractors.

Sealed bids will be received until 8:00 P. M. November 18th, 1919, by S. A. Ryan, Secretary of the City of Gainesville, Texas for furnishing all material and labor for the construction of approximately 31,000 square yards of street paving, 10,000 lineal feet curb and gutter. A certified check for the sum of $1000.00 payable to the order of Hon. E. N. Blackburn, Mayor, must accompany each bid. Plans and specifications may be obtained at the office of the engineer R. G. Carraway Company, Gainesville, Texas, upon a deposit of $10.00. The City of Gainesville, Texas, reserves the right to reject any or all bids and to waive formalitires.

Which said advertisement appeared in the Daily and Weekly Hesperian, a daily newspaper published in said City of Gainesville, in the issues of the 6th day of November, 1919, to the 16th day of November, 1919, in not less than ten issues; and

Whereas, all bids submitted were sealed and opened in the presence of a majority of the aldermen, and did remain on file in the Mayors Office open for public inspection at least forty eight hours before said contract was awarded to the successful bidder, and in said advertisement the city reserved the right to reject any and all bids and pending the advertisement of the work and contract proposed specifications therefor did remain on file in the office of the mayor subject to inspection of all parties desiring to bid.

Whereas, said Southern Construction Company, a co-partnership composed of Harry D. Levy and Lester Levy of the County of Dallas, State of Texas, have given a bond in accordance with Section 29 of the charter of said city securing the faithful performance of said contract and securing the rights of sub-contractors, materials men and laborers.

And whereas, said contract has been read and duly considered and understood.

Therefore, be it ordained by the City Council of the City of Gainesville, Texas:

That said contract be and the same is hereby in all things approved, ratified and confirmed as the act and contract of this council of the City of Gainesville, Texas, and the same shall have effect according to its tenor and

purpose; and it being agreeable to the parties signing said contract that payment for said street improvements be made by the issuance of six per cent (6%) interest bearing street improvement warrants, maturing one (1) to twenty (20) years, which warrants the City of Gainesville has agreed to issue, and the said Southern Construction Company, Contractor, has agreed to accept in payment therefor:

Therefore, it is further ordained that in accordance with said contract and agreement, warrants of the City of Gainesville to be called "City of Gainesville Street Improvement Warrants, Series....." be issued in the sum of fifty thousand ($50,000.00) dollars, payable to the said Southern Construction Company, Contractor, their assigns or bearer, evidencing the indebtedness due said contractor by the City of Gainesville, under and by virtue of said contract.

Said warrants shall be numbered from one (1) to fifty (50) inclusive, shall be in the denomination of one thousand ($1,000.00) dollars each, aggregating fifty thousand ($50,000.00) dollars, shall be dated November 20th, 1919, and shall become due and payable as follows, to-wit:

| Warrant Numbers | Maturity Dates | Amount |
|---|---|---|
| 1-2 | March 1, 1921 | $2000.00 |
| 3-4 | March 1, 1922 | 2000.00 |
| 5-6 | March 1, 1923 | 2000.00 |
| 7-8 | March 1, 1924 | 2000.00 |
| 9-10 | March 1, 1925 | 2000.00 |

| | | |
|---|---|---|
| 11-12 | March 1, 1926 | 2000.00 |
| 13-14 | March 1, 1927 | 2000.00 |
| 15-16 | March 1, 1928 | 2000.00 |
| 17-18 | March 1, 1929 | 2000.00 |
| 19-20 | March 1, 1930 | 2000.00 |
| 21, 22-23 | March 1, 1931 | 3000.00 |
| 24,25-26 | March 1, 1932 | 3000.00 |
| 27, 28-29 | March 1, 1933 | 3000.00 |
| 30, 31-32 | March 1, 1934 | 3000.00 |
| 33, 34-35 | March 1, 1935 | 3000.00 |
| 36, 37-38 | March 1, 1936 | 3000.00 |
| 39, 40-41 | March 1, 1937 | 3000.00 |
| 42, 43-44 | March 1, 1938 | 3000.00 |
| 45, 46-47 | March 1, 1940 | 3000.00 |

Said warrants shall bear interest at the rate of six per cent (6%) per annum from date until paid, interest payable March 1st, 1920, and semi-annually thereafter on the 1st day of September and on the 1st day of March of each year; principal and interest on said warrants shall be payable at the offices of the Brown-Crummer Investment Company, Wichita, Kansas.

Said warrants shall be signed by the mayor, countersigned by the city secretary, and registered by the city treasurer and the seal of the city shall be impressed upon each of them. The facsimile signatures of the mayor and city secretary may be lithographed upon the coupons attached to each of said warrants.

Said warrants shall be in substantially the following form:

No. .....

United States of America.

*State of Texas, County of Cooke.*

City of Gainesville

Street Improvement Warrant,

Series.....

This is to certify that the City of Gainesville, County of Cooke, State of Texas, for value received is justly indebted and promises to pay to the Southern Construction Company, Contractor, their assigns or bearer, on the 1st day of March, 19..., at the offices of The Brown-Crummer Investment Company, Wichita, Kansas, the sum of

One Thousand Dollars

in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum payable on the 1st day of March, 1920, and semi-annually thereafter on September 1st and March 1st of each year; and the city treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest payable at the place above named, upon presentation and surrender of warrant or proper coupon.

This warrant is one of a series of fifty (50), inclusive, in the denomination of one thousand ($1,000.00) dollars, issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to the Southern Construction Company, their assigns or bearer for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20th, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and Laws of the State of Texas, and pursuant to an ordinance passed by the city council of said City of Gainesville, Texas, on the 2nd day of December, 1919, recorded in Book 6, at page 570, *et seq.*, of the minutes of said city council.

The date of this warrant, in conformity with the ordinance above mentioned is November 20th, 1919.

And it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that the total indebtedness of said city, including this warrant, does not exceed any constitutional or statutory limitation.

In witness whereof the City of Gainesville has caused the corporate seal of said city to be hereto affixed and this warrant to be signed by its mayor, and counter-

signed by its city secretary and registered by the city treasurer, as of the date last above written.

Countersigned:

S. A. Bryan,
City Secretary, City of
Gainesville, Texas.

E. N. Blackburn,
Mayor, City of Gainesville, Texas.
W. E. Germany,
City Treasurer, City of
Gainesville, Texas.

The form of interest coupon shall be substantially as follows:

No. ..... On the 1st day of March, 1920. $30.00 the city treasurer of the City of Gainesville, Texas, will pay to The Southern Construction Company, their assigns or bearer, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas, the sum of thirty ($30.00) dollars, the same being six months interest due that day on City of Gainesville, Texas, Street Improvement Warrant, Series ..... No. ....., dated November 20th, 1919, to which this coupon is attached and is a part thereof.

E. N. Blackburn,
Mayor.

S. A. Bryan,
City Secretary.

Said warrants shall be executed and delivered to the said Southern Construction Company, contractor, upon completion of their contract in accordance with the terms and provisions thereof, upon certified state-

ment of account, or upon estimates of materials which have been furnished and labor which has been performed and accepted by said city prior to the date of approval of such estimates, such delivery to be made only after inspection of materials furnished and labor performed under said contract, and acceptance of said materials and work by the city council.

Be it further ordained by the city council that, to pay the interest and create a sinking fund sufficient to retire said warrants at their maturity, a tax of and at the rate of eight (8c) cents on the one hundred dollars' valuation of taxable property in said City of Gainesville, out of the tax of $1.50 on the one hundred dollars' appraised valuation of property in said city levied annually for general purposes and for the purpose of paying interest and providing the sinking fund on the bonded indebtedness and for the maintenance of public schools of said city, as provided in Sec. 1, Art. 3, of the Special Charter of the City of Gainesville, Texas, enacted by the 31st Legislature of Texas, at its regular session, is hereby levied for the year 1919; that during the year 1920, and each year hereafter while any of said warrants are outstanding and unpaid, and at the time other city taxes are levied in each of said year, there shall be computed and ascertained what rate of tax, based upon the latest approval tax rolls of said city will be necessary, requisite and sufficient to fully make, raise and produce in each of said years, the amount of principal necessary to be raised for that year plus the interest maturing in said year upon the amount of this series of warrants maturing

in said year, and for each of said years there is hereby ordered to be levied, assessed and collected, in due time, form and manner a tax at such rate as shall be found necessary as aforesaid, and all of the proceeds from such taxes shall be placed in a separate special fund for this series of warrants, known and designated as "Special Street Improvement Warrant Fund," and the city treasurer shall not honor any draft upon said fund or pay out any of the same, except in the payment of interest on said warrants or for retiring the same.

The fact that the streets of the city are in a deplorable condition the present severe weather making them almost impassable create a public emergency and an imperative public necessity that the rule requiring ordinances to be read at three several meetings be suspended and that this ordinance take effect from and after its passage and it is so ordained.

Passed this the 16th day of December, 1919.

Approved this the 16th day of December, 1919.

E. N. Blackburn,
Mayor, City of Gainesvill, Texas.

Attest:

S. A. Bryan,
City Secretary, City of Gainesville, Texas.

Endorsed:

No. 241 At Law. City of Gainesville et al *vs.* Southern Construction Co. et al. In the U. S. Dist. Court for the Eastern Dist. of Texas at Sherman Texas. Plaintiff's Third Amended Original Petition. Filed April 13, 1926. F. A. King, Clerk U. S. Court. By J. R. Blades, Deputy.

**Amended Answer of Defendant Head.**

*In the District Court Cooke County, Texas.*

*No.* 9573.

*City of Gainesville,*

**vs.**

*Southern Construction Company, et al.*

Now comes the defendant, H. O. Head, executor of the will of H. W. Head, deceased, and with leave of the court amends its original answer filed on ..... day of ....., 192..., and for answer herein says:

I.

He demurs to plaintiff's first amended original petition because the facts therein alleged show no cause of action against the estate of H. W. Head.

.....

*Attorneys for said Defendant.*

II.

He demurs specially to said first amended original petition because:

(a) It does not set forth with sufficient particularity and detail the work the Southern Construction Company contracted to do, and the part of said work that was done, and the part that was not done.

(b) Sufficient facts are not alleged to show that the warrants said to have been issued by plaintiff were legal and binding obligations upon it.

(c) Sufficient facts are not alleged to show that the warrants said to have been issued by plaintiff were of any value.

(d) Sufficient facts are not alleged to show that plaintiff is entitled to have any of said warrants or their proceeds delivered to it, instead of to the Southern Construction Company or its assignee.

(e) It is not alleged that said warrants were not turned over to the Southern Construction Company or to its assignee by H. W. Head, by direction or authority of plaintiff.

(f) It does not allege the particular work, if any, plaintiff designated for the Southern Construction Company to do which it failed to do in 180 days.

HEAD, DILLARD, SMITH, MAXEY & HEAD,
*Attorneys for said Defendant.*

III.

For general answer to said first amended original petition he denies every allegation therein contained and demands strict proof thereof.

HEAD, DILLARD, SMITH, MAXEY & HEAD,
*Attorneys for said Defendant.*

IV.

For special answer to plaintiff's pleading this defendant says that under the alleged contract between plaintiff and the Southern Construction Company plaintiff was to execute and deliver to said company in payment for the work done thereunder legal and binding warrants and obligations, but this it failed to do, and instead, whatever instruments were delivered or tendered were of no validity whatever. That said instruments instead of being warrants in payment for work actually done, were, if anything, bonds or contracts to

pay for work to be done in the future, and were issued without authority of law, and without compliance with plaintiff's charter for the issuance of either legal bonds or warrants, and said instruments were and are not binding on plaintiff, and were and are of no value whatever, and said Construction Company was not required to do said work and accept said instruments in payment therefor, and cannot be held liable in damages for failure to do any work or furnish any material which it may have failed to do or furnish as alleged. That work actually done and material actually furnished by said construction company was, and is, of value much more than all the warrants or instruments, if any, placed in this defendant's hands under the instruments set forth in plaintiff's pleading. That the alleged contract between plaintiff and the Southern Construction Co. stipulated for the construction of 31,000 square yards of street paving and 10,000 lineal feet of curb and gutter which at the contract price amounted to at least $200,000.00 which was to be paid for in legal street improvement warrants maturing one to twenty years. That under plaintiff's charter and said contract it, plaintiff, was bound and required to pay for all of said paving, curb and gutter with the power, by complying with Articles 999 and 1000 of our Revised Statutes, to reimburse itself by assessing two-thirds of the cost, except at the intersection of streets, against the property fronting on the streets to be improved. The debt incurred by plaintiff to the contractor, Southern Construction Co., however, was for

the full amount, and in attempting to create such indebtedness plaintiff did not comply with that provision of our Constitution which says no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon. In fact the value of the property subject to taxation by plaintiff was not sufficient to authorize it to assess such a rate of taxation, especially in addition to the taxes already assessed which had priority. That if plaintiff made any provision for assessing a tax to meet such interest and sinking fund it was only for a part, to-wit, about $50,000.-00, of the debt for which it so contracted to incur and become liable, so that said entire contract was and is illegal, null and void. That the only authority plaintiff had to issue said warrants or incur a debt for improving its streets was the following provisions of its charter:

"Art. 999—*Power of City Council to Have Streets etc., graded, etc.*—The City Council shall be invested with full power and authority to grade, gravel, repair, pave or otherwise improve any avenue, street, or alley, or any portion thereof, within the limits of said city, whenever, by a vote of two-thirds of the aldermen present, they may deem such improvement for the public interest provided, the city council pay one-third and the owner of the property two-thirds thereof, except at the intersection of streets, from lot to lot across the streets either way, shall be paid for by the duty alone; and

said costs shall be assessed on the property fronting on said street so improved, to be collected in equal annual payments, not less than five in number; and all moneys collected from these assessments shall be appropriated exclusively to the payment of the bonds issued for the payment of the cost of said improvement."

"Art. 1000.—*Estimate of Cost of Improvement shall be made, etc.* Whenever the city council shall determine to make any such improvement, they shall cause an estimate to be made of the probable cost thereof by the city engineer, or by some other officer of the city, or by a committee of three aldermen; and such engineer or other officer or committee shall also report a full list of all lots or fractional lots giving number and size of the same, and the number of the block in which situated and the names of the owners thereof, if known, and such other information as may be required by the city council; and if there be any lot or fractional lot the owner of which is not known, the same shall be entered on said list as unknown; it shall be the duty of the officer or committee aforesaid to enter on said list opposite each lot or fractional lot lying and being on each side of the street, avenue or alley so to be improved as aforesaid, one-third of the estimated expense for such work or improvement on such avenue, street, or alley, fronting, adjoining or opposite such lot or fractional lot; and on the acceptance and approval of said report and list by the city council, said amount shall be imposed, levied and assessed as taxes, and shall

be a lien upon the property until the payment of the same."

That said charter, and the authority thereby attempted to be conferred, are invalid, null and void both under the constitution of the United States and of this state, in that authority is thereby attempted to be conferred upon plaintiff, one of the interested parties, the right and power to assess upon the property fronting on the street two-thirds of the cost of the improvement, without any notice to the property owner, or opportunity for him to be heard before an impartial tribunal, and without reference to the benefit such property will receive, the effect of which would be to take the owner's property without due process of law. That even if said charter be valid, the requirements thereof in the incurring of said debt and the issuance of said warrants were not complied with in that the particular streets and alleys to be improved were not first determined and designated by a vote of two-thirds of the aldermen present at any meeting as being for the public interest, and by the contract and ordinance providing for the improvement it was not required that plaintiff pay one-third and the owner of the property two-thirds of the cost, except at the intersection of streets, and that at such intersections all costs should be paid for by the plaintiff alone, and said costs should be assessed on the property fronting on the street so improved to be collected in equal annual payments not less than five in number; nor did the city council require an estimate of the probable cost to be made by the

engineer or any other officer of the city, or by a committee of three aldermen, or by any one else, or a report of the lots and blocks and names of the owners as required by the charter. In fact said debt was sought to be incurred and said warrants issued under the Act of 1909 known as the State Paving Law, which had no application to plaintiff inasmuch as it was incorporated under a special act of the legislature as alleged in the petition. That proceeding under said Act of 1909 plaintiff assessed three-fourths instead of two-thirds of the cost against the abutting property owners, and only proposed to pay one-fourth, instead of one-third, itself. That said Act of 1909 is unconstitutional, null and void in that it undertakes to confer upon the city council, one of the interested parties, the right itself to fix and determine the amount each property owner should be assessed and required to pay and to decide whether his property would be benefited that amount; and this without any notice to the property owner or opportunity for him to be heard on whether his property will be so benefited. That said warrants and contract are also wholly void and of no value because Article IV of plaintiff's charter provides that:

"The City Council shall have power and authority by ordinance duly passed, if it so elects, to borrow money on the credit of the city for the permanent improvement of its streets, avenues, alleys, public grounds, building of sidewalks, macadamizing, remacadamizing, paving and repaving of streets, alleys, avenues and public grounds, and the City Council may issue bonds

for all or any of the above purposes to any amount not exceeding $150,000 in any one year * * * No bonds shall be issued for any purpose in excess of $2500 unless an election be ordered by the Mayor and City Council and if at said election the majority of the votes polled shall be in favor of creating such debt it shall be lawful for the City Council to make the issuance of the bonds * * * but if a majority of the votes polled shall be against the creation of such debt, it shall be unlawful for the City Council to issue the bonds * * * No bond shall be issued drawing more than five per cent interest and they shall be invalid if sold for less than par and accrued interest."

Defendant says that this clause of the charter is the only authority given plaintiff for improving the streets on a credit and said warrants are in reality bonds within the meaning and intention of this clause of plaintiff's charter, and calling them warrants is only a thin attempted evasion thereof, and said bonds called warrants were issued by the city council without being authorized by an election as required by said charter and were made to bear six per cent interest instead of five or less.

Said warrants and contract are also void and of no value because by Sec. 6 of Article VII of plaintiff's charter it is provided that: "No ordinance shall be passed finally on the date it is introduced, except in the case of public emergencies," and the ordinance under which said warrants were issued was finally passed on the day it was introduced as appears from plaintiff's petition.

Said warrants and contract are also void and of no value because Sec. 28 of Art. II of plaintiff's charter provides:

"No contract shall be entered into until an appropriation has been made therefor nor in excess of the amount appropriated and all contracts, whenever practicable, shall be made upon specifications, and no contract shall be binding upon the city unless it has been signed by the mayor and the expense thereof charged to the proper appropriation, and whenever the contract charged to any appropriation equals the amount of said appropriation, no further contracts shall be signed by the mayor.

"All contracts, of whatever character, pertaining to public improvements, or the maintenance of public property of said city, involving an outlay of as much as two hundred and fifty dollars ($250.00) shall be based upon specifications to be prepared and submitted to and approved by the mayor and city council, and after approval by the mayor and city council, advertisement for the proposed work, or matters embraced in said proposed contract, shall be made, inviting competitive bids for the work proposed to be done, which said advertisement shall be put in a daily newspaper not less than ten times."

And no appropriation had been made therefor before said contract was entered into, or at any time, and said contract was not based upon specifications approved by the mayor and city council.

That the contract between plaintiff and the Southern Construction Co. was not based upon, and did not contain, any specifications of the work to be done as required by plaintiff's charter, but only contained a statement of the prices to be charged and paid for whatever material might be furnished and work done thereunder, and required plaintiff to issue legal warrants in payment therefor, but also stipulated that said construction company agreed to accept deferred payments on contracts with property owners in one and two years, and to charge interest on the same at the rate of eight (8) per cent per annum, the effect of which was to bind plaintiff to issue to said company legal warrants for the full amount of material furnished and work done under the contract, including the entire street and intersections less such valid contracts of property owners as it had agreed to accept in payment which plaintiff might deliver to it, and this defendant says that the material furnished and work done by said construction company under said contract at the special instance and request of plaintiff amounted to at least the sum of $150,000.00 and plaintiff only issued to it $47,500 in pretended warrants, but in reality bonds, none of which were valid or legal, and only delivered to it contracts of property owners to the amount of $..... and pretended paving certificates of other property owners none of which were valid, legal or binding obligations. That all money received or collected upon said warrants or bonds or said property owner's contracts

or paving certificates has been credited upon the amount which plaintiff owed said Southern Construction Company for material furnished and work done as aforesaid, and there is still a balance of $..... due it, which said construction company, for a valuable consideration transferred and assigned to said H. W. Head to, in part, compensate him for money he loaned and advanced to it, and which plaintiff refuses to pay though frequently requested to do so.

V.

This defendant says that the term "working days" as used in the alleged contract between plaintiff and the Southern Construction Company only included days on which work of the kind could be properly done, and defendant denies that there were any working days delay as meant in the contract above the 180 days as alleged in plaintiff's pleading. That the term "working days" had by custom in the particular business acquired the meaning here alleged. This defendant especially denies that the Southern Construction Company had become legally indebted to R. C. Caroway Company in any sum whatever, and that plaintiff had any authority to purchase said claim, or has legally acquired such claim if any existed. This defendant further says plaintiff by formal resolutions accepted the work done by the Southern Construction Company in the full amount of the contract, and directed the warrants delivered to it.

VI.

This defendant further says that if plaintiff or those under whom it claims ever had any cause of action against H. W. Head or his estate, or this defendant as executor of his will, by reason of any of the facts alleged in plaintiff's pleading the same accrued more than two years before the filing of plaintiff's amended petition, which was on or about the 10th day of December 1923, and is therefore barred by our statute of limitations.

VII.

This defendant further says that under the contract between plaintiff and the Southern Construction Company the said construction company was to be given by plaintiff approximately 31,000 square yards of street paving and 10,000 lineal feet of curbing and gutter at the prices shown in said amended petition, and said company's bid and contract was based upon the agreement and understanding that it would have that amount of work to do, but instead of plaintiff giving said construction company that amount of work, it only gave them a small part thereof, and although frequently requested refused to give any more work and so notified said company. That the profit which said construction company would have made on the work which plaintiff wrongly refused to give it would have amounted to much more than any warrants, or their value, or proceeds in the hands of said Head or his estate, and this defendant

says that by reason of these facts plaintiff is not entitled to have any warrants, if any, or their proceeds which H. W. Head received under said instruments delivered to it, but said Head was bound to deliver same to the Southern Construction Company, or its assignee, and said construction company and not plaintiff is entitled thereto.

VIII.

This defendant further says that even if it be true that under all the facts as they then existed plaintiff was entitled to have some of said warrants delivered to it instead of to the Southern Construction Company on account of the alleged failure of the construction company to fully comply with its contract, it was also entitled, if it elected to do so, to treat said warrants as having been paid to said construction company, and as its property, and require it to compensate plaintiff in money for the damage it sustained by reason of such failure, and this plaintiff elected to do, and as shown by said amended petition, and as this court judicially knows, plaintiff in this suit elected to claim and sue for said damages instead of for the return of the warrants or their value, or proceeds, and at a former trial recovered a final judgment for the full amount of such damages against said Southern Construction Company, which judgment it still holds, and this defendant says plaintiff is bound by such election, and has no further interest in said warrants or their proceeds, but the same belong to said construction company or to this defendant as its assignee.

IX.

This defendant further says that if it be true, as alleged by plaintiff, that certain warrants were delivered to H. W. Head under the instruments alleged to have been executed by him, and that he in turn had delivered them to the Southern Construction Company or to the Brown-Crummer Company this was after the mayor and city council of plaintiff had from time to time regularly audited the estimates and claims of said Construction Company for material furnished and work and labor done under said contract and by formal resolutions had approved same and ordered said warrants delivered to said Southern Construction Company and this defendant says if said H. W. Head delivered any of said warrants to the said Construction Company it was in accordance with the instruments under which they were placed in his hands, and in obedience to the orders and direction of plaintiff, and if instead of delivering them direct to the said Southern Construction Company he sold them to Brown-Crummer Company this was done by the direction and approval of both plaintiff and the Southern Construction Company and this defendant says that all warrants and their proceeds which ever came to the hands of H. W. Head were by him promptly paid and delivered to said Southern Construction Company and for its benefit, and no part thereof were in his hands at the time of the institution of this suit, or when he first had notice, if ever, that plaintiff claimed it was not entitled to same.

X.

This defendant further says that even if some of said warrants were by H. W. Head, without sufficient authority, delivered to the Southern Construction Company or to Brown-Crummer Company, plaintiff has sustained no injury or damage therefrom because those so improperly delivered were not legal obligations of plaintiff and it cannot be required to pay the same, and they therefore were and are of no value whatever.

XI.

This defendant further says that on the 21st day of January, 1921, plaintiff by its mayor, Hon. J. A. Thomas, wrote a letter to Mr. A. S. Goetz c/o Thurber Brick Company in substance as follows:

"Gainesville, Texas,
1/21/21

Mr. A. S. Goetz,
c/o Thurber Brick Co.,
Forth Worth, Texas.

Dear Sir:

The City of Gainesville, Texas, is to pay for brick to be delivered by you out of the proceeds of certain warrants.

"These warrants have been delivered to Hayden W. Head, Vice-President of the Merchants & Planters National Bank, of Sherman, Texas.

"If convenient to you it would please us to have you continue shipping the brick to the City of Gaines-

ville, but send the invoices for the same to Mr. Hayden W. Head, Sherman, Texas, who will remit for the same as per our contract with you.

"This will save a transfer of this money to us each month and will be agreeable to him as he will indicate to you in a letter to that effect.

Yours very truly,
City of Gainesville, Texas,
By J. A. Thomas, Mayor."

And on the 29th day of January, 1921, H. W. Head wrote a letter to plaintiff's mayor, Hon. J. A. Thomas, in substance as follows:

"Sherman, Texas,
January 29, 1921.

"Mr. J. A. Thomas, (Mayor)
Gainesville, Texas.

Dear Sir:

"I have before me a copy of your letter of the 21st instant to Mr. Arthur S. Goetz, and I beg to advise that I will conform to your wishes and make payment of the invoice of the Thurber Brick Company on the 15th of each month covering shipments made the previous month, for brick and freight on same furnished to the Southern Construction Company.

"I understand that I am to allow the Southern Construction Company credit for such amounts on its account with me against the proceeds of the warrants delivered to me by them.

Yours very truly,
(Signed) H. W. Head."

This defendant is informed and believes and so charges that the amount plaintiff owes the Thurber Brick Company for brick furnished under said letters greatly exceeds any amount of warrants, or their proceeds, or value, in the hands of H. W. Head, or his estate, so that all such warrants and proceeds, if any there be, belong to said Thurber Brick Company and plaintiff has no right thereto.

XII.

This defendant further says that if it be true that plaintiff did designate some work for the Southern Construction Company to do which was not done, such work was upon California and Lindsay Streets, and said Construction Company was, by this court at the instance of the property owners on said streets, in suits to which plaintiff was a party, enjoined from doing said work, and under the alleged contract between plaintiff and said Construction Company was thereby, without fault on its part, prevented and relieved from doing said work and plaintiff failed and refused to designate other work for it to do. However, before said Construction Company was so enjoined it had at the instance and request of plaintiff done a large amount of work on said California and Lindsay Streets in the way of excavating and otherwise which was of the reasonable value of $3600.00 for which plaintiff is liable to it and refuses to pay.

XIII.

This defendant says he denies that H. W. Head was in partnership with Harry D. Levy or Lester Levy or the Southern Construction Company as alleged by plaintiff.

Wherefore, this defendant prays to be discharged with his costs, and for all other relief he may be entitled to receive.

HEAD, DILLARD, SMITH, MAXEY & HEAD,
*Attorneys for Defendant, H. O. Head, Executor.*

I, H. O. Head do swear that the facts alleged in Section XIII of the foregoing answer are true, and I especially deny that H. W. Head was in a partnership with Harry D. Levy, Lester Levy or Southern Construction Company as alleged by plaintiff.

H. O. Head.

Sworn to and subscribed before me, this the 17 day of May, 1926.

(Seal) F. A. King, Clerk U. S. Dis. Court.
By J. R. Blades, Deputy.

Endorsed:

D. L. No. 241. City of Gainesville vs. Southern Construction Co., et al. Amended answer of defendant Head. Filed May 17, 1926, F. A. King, Clerk, by J. R. Blades, Deputy.

**First Amended Answer of Defendant, Brown-Crummer Investment Co.**

*In the Distrnct Court of the United States for the Eastern District of Texas, at Sherman.*

*No.* 241 *At Law.*

*City of Gainesville*

vs.

*Southern Construction Company, et al.*

Now comes Brown-Crummer Investment Company, one of the defendants in the above entitled and numbered cause, and leave of the court being first had and obtained, files this its first amended original answer and respectfully says:

1.

Said defendant demurs generally to plaintiff's third amended original petition and to plaintiff's replications and supplemental pleadings herein and says the same are insufficient in law and show no cause of action against it, of which it prays judgment of the court.

2.

Said defendant denies all and singular the allegations in plaintiff's said third amended original petition and in plaintiff's replications and supplemental pleadings herein contained, and of the same demands strict proof, and of this it puts itself upon the country.

3.

The defendant specially denies that after the sale and delivery to it of the warrants mentioned in plain-

tiff's third amended original petition the contingency arose under which said Southern Construction Company and the defendants, Harry D. and Lester Levy, failed and refused to do the paving work in excess of $34,736.29. This defendant further denies that the real and intended meaning of the obligations referred to in plaintiff's said pleading was to protect and indemnify plaintiff in delivering the warrants to Southern Construction Company before the work mentioned was actually done in the event that said construction company did not do the $50,000.00 worth of work mentioned. This defendant further denies that at the time it purchased the warrants mentioned and received delivery of the same prior thereto, or at any of the times referred to in plaintiff's said pleading, the said Brown-Crummer Investment Company, had or possessed any knowledge of any facts or circumstances referred to in plaintiff's said pleading in anywise affecting the validity of said warrants or the validity or regularity of the proceedings connected with the authorization, issuance or delivery of said warrants or any of them. This defendant further denies that said warrants or any of them were not or are not valid, legal obligations on the part of the city, or that said warrants or any of them are void or unenforceable against the plaintiff city.

4.

This defendant alleges that at all times involved herein, the charter of the City of Gainesville authorized

said city, generally, to contract and be contracted with and said charter provided further that the specifications of particular powers therein should not be construed as a limitation upon the general powers of the city, but that it was the intention of said charter to grant to and bestow upon the inhabitants of the City of Gainesville full powers of self-government and that they should have and exercise all powers of municipal government and they should have and exercise exclusive power and control over the streets, avenues, alleys and highways of the city and to open, alter, widen, extend, establish, grade, pave, macadamize or otherwise improve the same, and to levy taxes for general purposes and to borrow money on the credit of the city for permanent improvements and for the permanent improvement of its streets, avenues and alleys; building of sidewalks, macadamizing, paving and repaving of the streets, alleys and avenues, and to do said things on credit, and, in addition to all other powers, said charter further grants to the city full power and authority to grade, gravel, pave or otherwise improve any street or avenue or any other public highway, whenever by a majority of aldermen present, they deem such improvement for the public interest.

Answering further, if required, this defendant says that on or about November 20, 1919, plaintiff, City of Gainesville, acting by and through its officials thereunto duly authorized, did enter into a contract with Southern Construction Company, whereby the latter agreed to do certain paving work in said city at and

for certain compensation set forth and referred to in said contract, and by supplemental contract, and it was agreed between said parties that said compensation for the labor, material and supervision entering into said paving work should be paid for by said city by certain interest bearing warrants, said warrants to be issued either upon the completion of said contract or upon regularly approved estimates; that on or about December sixteenth, 1919, the governing body of said city, to-wit, the city council, met in regular session and duly and regularly passed an ordinance confirming the contracts above mentioned, and providing for the issuance of warrants as evidence of the city's debt therefor, and setting forth the form in which such warrants were to be prepared and issued, together with interest coupons to be attached to said warrants, and providing for the levy of a tax to pay the interest thereon and creating a sinking fund for their redemption at maturity. A true copy of said ordinance, containing also copies of the contract and supplemental contract above mentioned and containing the form of such warrant and interest coupon, is attached as an exhibit to plaintiff's second amended original petition herein, which said exhibit is here now made a part hereof, the same as if fully and at large set out herein. Said ordinance provided that in payment for said street paving to be done by Southern Construction Company, warrants of the City of Gainesville, to be called "City of Gainesville Street Improvement Warrants, Series No. ....," be issued in the sum of $50,000.00, payable to the said

Southern Construction Company, contractor, their assigns or bearer, evidencing the indebtedness due said contractor by the City of Gainesville under and by virtue of said contracts, and further provided that said warrants should be numbered from one to fifty inclusive, and should be in denominations of one thousand dollars, each, and should be dated November twentieth, 1919, and further set forth the dates of maturity of said respective warrants, and provided that said warrants should bear interest at the date of six per cent per annum from date until paid interest payable March first, 1920, and semi-annually thereafter on the first day of September and on the first day of March of each year, and provided that principal and interest on said warrants should be payable at the offices of this defendant at Wichita, Kansas, and said ordinance further provided that said warrants should be executed and delivered to the said Southern Construction Company, contractor, upon completion of their contract in accordance with the terms and provisions thereof, upon certified statement of account, or upon estimates of materials which have been furnished and labor which has been performed and accepted by said city prior to the date of approval of such estimates, such delivery to be made only after inspection of materials furnished and labor performed under said contract and acceptance of said materials and work by the city council.

5.

At the time of the making of said contracts between the City of Gainesville and Southern Construction Company, and at the time of the passage of said ordinances above mentioned, and at all of the times hereinafter mentioned, said H. W. Head was a partner of Southern Construction Company and was financially interested in said Southern Construction Company, and in the prosecution and completion of the paving work above mentioned by said Southern Construction Company, and in procuring this defendant to purchase, acquire and pay for said warrants with attached coupons, so that thereby Southern Construction Company might acquire the proceeds thereof, and at all of said times, it was known, understood and contemplated by said Head and Southern Construction Company and by said City of Gainesville, that this defendant would purchase, acquire and pay for said warrants as and when issued and delivered by said city, and that this defendant was under contract and agreement so to do, and that said warrants and coupons were to be and in fact they were, payable to Southern Construction Company or bearer, and when issued would be sold and would pass from hand to hand for value in the market; that Southern Construction Company proceeded with the performance of said contracts for said paving work and from time to time, to-wit, on or about April sixth, 1920, on or about September twenty-first, 1920, on or about October fifth, 1920, on or about November second, 1920, and on or about November

sixteenth, 1920, estimates of materials which had been furnished and labor which had been performed and accepted by said city prior to the date of approval of such estimates and after inspection of such material furnished and labor performed and acceptance thereof by the city council of said city, were by said city council approved, and on or about each of said dates the city council of said city in regular session and with a quorum present, duly and regularly passed a resolution auditing and allowing said respective estimates and recited in said resolution that the materials furnished and the work performed and covered by said respective estimates had been by the city council inspected and accepted by it to be in accordance with said contracts for paving and the plans and specifications therefor, and that it had been determined by said council that said materials and work were well worth the price as agreed to be paid therefor and as reflected in said estimates, and that said estimates had been duly audited and found to be correct, and each of said resolutions thereupon directed and stipulated that warrants representing the amount of said respective estimate should be delivered to said Southern Construction Company in the form and according to the tenor hereinabove mentioned, and said resolution in each instance further recited that the City of Gainesville had received full value and consideration for the warrant therein authorized to be delivered, and on each of said occasions the mayor and each of the aldermen of said city did sign and swear to an affidavit on oath

stating that the statements contained in said respective resolutions approving said respective estimates were true and correct and that the materials so furnished and the work performed and covered by said respective estimates had been by said council inspected and accepted, and found to be in accordance with said contract and plans and specifications, and had been determined by said council to be well worth the price agreed to be paid therefor, as reflected in said statement of account or estimate, and that the City of Gainesville had received full value for the money represented by said warrants; that the warrants authorized and ordered to be issued and delivered under the resolution of April sixth, 1920, above mentioned were: Warrants numbers 1 to 3, inclusive, each in the denomination of $1,000.00 with interest coupons attached; that the warrants authorized and directed to be issued and delivered by the resolution of date September twenty first, 1920, above mentioned, were warrants numbers 41 to 50, inclusive, each in the denomination of $1,000.00 with interest coupons attached; that the warrants authorized and directed to be issued and delivered by the resolution of date October fifth, 1920, above mentioned, were warrants numbers 24 to 40, inclusive, each in the denomination of $1,000.00 with interest coupons attached; that the warrants authorized and directed to be issued and delivered by the resolution of date November second, 1920, above mentioned, were warrants numbers 12 to 23, inclusive, each in the denomination of $1,000.00, with interest coupons

attached; that the warrants authorized and directed to be issued and delivered by resolution of date November 16, 1920, above mentioned, were warrants numbers 4 to 13, inclusive, each in the denomination of $1,000.00, with interest coupons attached; that each of said warrants was substantially in terms and language as follows:

No. .... United States of America $1000.00

*State of Texas, County of Cook.*

City of Gainesville

Street Improvement Warrant,

Series .....

This is to certify that the City of Gainesville, County of Cook, and State of Texas, for value received, is justly indebted and promises to pay to The Southern Construction Company, Contractor, their assigns or bearer, on the 1st day of March 19.., at the offices of The Brown-Crummer Investment Company, Wichita Kansas, the sum of one thousand dollars in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the 1st day of March, 1920, and semi-annually thereafter on September 1st and March 1st of each year; and the city treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest thereon, evidenced by coupons attached hereto,

principal and interest payable at the place above named, upon presentation and surrender of warrant or proper coupon.

This warrant is one of a series of fifty (50) warrants, numbered consecutively from one (1) to fifty (50), inclusive, in the denomination of one thousand ($1,000.00) dollars, each, aggregating the sum of fifty thousand ($50,000.00) dollars; issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to the Southern Construction Company, their assigns or bearer, for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20th, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the constitution and laws of the State of Texas and pursuant to an ordinance passed by the city council of said City of Gainesville, Texas, on the 2nd day of December, 1919, recorded in Book 6, at pages 570, *et seq.*, of the minutes of said city council.

The date of this warrant, in conformity with the ordinance above mentioned is November 20th, 1919.

And it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that the total indebtedness of said city, including this warrant, does not exceed any constitutional or statutory limitation.

In witness whereof, the City of Gainesville has caused the corporate seal of said city to be hereto affixed and this warrant to be signed by its mayor, and countersigned by its city secretary, and registered by the city treasurer, as of the date last above written.

(Signed) E. N. Blackburn,
Mayor, City of Gainesville, Texas.

Countersigned:
City Secretary, City of Gainesville, Texas.
(Seal) Registered this the .... day of .... 1919.
(Signed) W. H. Garmany,
City Treasurer, City of
Gainesville, Texas.

that the interest coupons attached to said warrants were in terms and language substantially as follows:

No. ..... $30.00

On the 1st day of
March 1920.

the city treasurer of the City of Gainesville, Texas, will pay to The Southern Construction Company, their assigns or bearer, at the offices of The Brown-Crummer Investment Company, Wichita, Kansas, the sum of thirty ($30.00) dollars, the same being six months interest due that day on City of Gainesville, Texas, Street Improvement Warrant, Series ...., No. ...., dated November 20th, 1919, to which this coupon is attached and is a part thereof.

(Signed) E. N. Blackburn.

.....
City Secretary.

that each of said warrants recited that it was issued for the purpose of evidencing a valid indebtedness of the City of Gainesville to the Southern Construction Company, their assigns or bearer, for the construction of certain street improvements therein mentioned, being the identical street improvements herein referred to, under and by virtue of the constitution and laws of the State of Texas and pursuant to the ordinance passed by the city council of said City of Gainesville, of date December second, 1919, hereinabove referred to, and each of said warrants further certified and recited that all acts, conditions and things required to be done, precedent to and in the issuance of said warrant had been properly done, happened and performed and in regular and in due time, form and manner as required by law, and that the total indebtedness of said city, including said warrant did not exceed any constitutional or statutory limitation; that following the passage of each of said resolutions said City of Gainesville, H. W. Head and Southern Construction Company prepared and presented to this defendant from time to time the said warrants with interest coupons thereto attached, together with certified copies of the ordinances and resolutions above mentioned and originals of the affidavits above mentioned, and also full and complete certified transcripts of the proceedings of the city council of the said City of Gainesville, purporting to show and showing the regularity of its actions in the issuance of said warrants, which transcript contained certified copies of the ordinances and resolutions au-

thorizing the issuance of said warrants, and contained certified copies of the resolutions and orders above mentioned, auditing, approving and allowing the estimates above mentioned and certifying said estimates to be true and correct, and that the materials had been furnished and the work performed by said Southern Construction Company representing said warrants and said transcript contained affidavit certifying to the genuineness of the signatures of the city officials, required by the city charter to sign and execute said warrants, and that every condition and requirement precedent to the issuance of legal and binding warrants had been complied with; that all of said proceedings were had and acts done and caused to be done by said parties and each of them with the purpose and intention of causing and inducing this defendant to believe and rely upon the truth of the recitals and representations contained in said ordinances, resolutions, warrants, affidavits and proceedings and for the purpose of inducing and causing this defendant to purchase and pay for said warrants with interest coupons attached, and with the purpose of rendering said warrants and coupons salable and merchantable on the market, all of said parties knowing and contemplating, as hereinbefore stated, that said warrants and coupons according to their tenor, were payable to Southern Construction Company or bearer and would in all probability pass and be sold from hand to hand in the market, after being acquired by this defendant; that believing and relying upon the truth of said representations and recitations

and each and all of them, this defendant did purchase and pay for all of said warrants with interest coupons attached without any notice of any infirmity in any of said warrants or coupons, and thereupon it acquired the legal and equitable ownership of same; that thereafterwards, this defendant, as said parties at all times contemplated it would do, did sell all of said warrants and coupons to numerous persons and customers who likewise bought and paid value for same, believing and relying upon the truth of said representations and recitations and without knowledge of any infirmity in any of said warrants or coupons; that thereafterwards, this defendant re-acquired from the purchasers thereof warrants numbers 7 and 8, due March first, 1924, each in the principal sum of $1,000.00 and warrants numbers 9 and 10 and 11 and 12, due March first 1925, each in the principal sum of $1,000.00, and interest coupons due March first, 1924, aggregating the principal sum of $1320.00, and interest coupons due September first, 1924, aggregating the principal amount of $1260.00, and interest coupons due March first, 1925, aggregating the principal amount of $1260.00, and interest coupons due Sept. 1, 1925, aggregating $1200.00 and interest coupons due March 1, 1926, aggregating $1200.00, an itemized list of which warrants and coupons is hereto attached and marked Exhibit "A" and made a part hereof for more particular description and identification, and acquired from said purchasers all of their respective claims and causes of action against the City of Gainesville, that thereby this defendant again became and

still is the legal and equitable owner of said warrants and coupons listed in said Exhibit "A" and of the causes of action aforesaid; that this defendant was not at the time that plaintiff filed its second amended original petition herein and is not now the owner of any of said warrants and coupons herein mentioned, except those identified in said Exhibit "A"; that said warrants and interest coupons mentioned in Exhibit "A" constitute a valid and subsisting indebtedness of the City of Gainesville now past due and payable and said City of Gainesville has failed and refused, and though often requested to do so, still fails and refuses to pay the same or any part thereof to this defendant's damage in the sum of fifteen thousand ($15,000.00) dollars, with interest at the rate of six per cent per annum from the maturity date of each of said warrants and interest coupons mentioned in Exhibit "A" until paid.

**6.**

This defendant alleges further that the recitations and representations above mentioned and set forth in the ordinances, resolutions, affidavits, proceedings and warrants above named, were and are true, but if mistaken as to the truth of any of them, this defendant alleges that by virtue of the facts herein set out said City of Gainesville, H. W. Head, Southern Construction Company and each of them are estopped and precluded against this defendant from alleging or asserting that any of said representations or recitations

were or are untrue. This defendant alleges further that its co-defendant herein, H. O. Head, executor of the estate of H. W. Head, deceased, is estopped and precluded to set up any alleged infirmity or irregularity in any of said warrants or coupons as against this defendant, for the said H. W. Head, deceased, did, in order to cause and induce this defendant to purchase and pay for said warrants and coupons, he being financially interested in procuring and causing this defendant to do so, represent to this defendant that all necessary proceedings and requirements precedent to the legal issuance and delivery of said warrants and coupons had been had and done in accordance with law, and that the materials had been furnished and work performed represented by said warrants as set forth in the ordinances, resolutions and affidavits above mentioned, and did represent to this defendant that said ordinances, resolutions, affidavits and proceedings above mentioned were genuine and reflected the true facts, and this defendant in purchasing and requiring said warrants and coupons did believe and rely upon said representations as he purposed and intended it should do, and this estoppel is especially plead herein against said H. O. Head, as executor of the estate of said H. W. Head, deceased, and the attempt of said co-defendant, H. O. Head, executor, to question or challenge the validity or enforcibility of any of said warrants or coupons herein is an unwarranted and collateral attack on said warrants and coupons, which he can not be heard to make herein.

7.

That any and all payments heretofore made by the City of Gainesville to this defendant on the principal and interest of said warrants were made to it as agent only and such funds were paid by it as such agent to the then owner and holder of said warrants and interest coupons who presented same at the office of this defendant for payment, at which office said warrants and interest coupons are by their terms payable; that this defendant had and has no other or further interest in said warrants or coupons on which such payments have heretofore been made than to submit same to the City of Gainesville for payment and to receive payment from the city in behalf of the then owners and holders thereof, which it did and promptly transmitted the amounts collected to said owners and holders; that all of the payments heretofore made by said City of Gainesville were voluntarily made by it and with full knowledge of all of the facts and circumstances connected with the authorization, issuance and delivery of said warrants and coupons.

8.

This defendant alleges further that plaintiff has heretofore paid off a number of the warrants and coupons by it issued and delivered as aforesaid and also by its pleadings in this cause from time to time has elected to treat all of the warrants and coupons mentioned, issued and delivered by it as valid and binding obligations of said plaintiff city and has elected to sue for the damages it has suffered by reason of the

alleged failure of defendant, Southern Construction Company, to complete said paving work and by reason of the alleged breach by H. W. Head and his executor of the indemnity agreement signed by H. W. Head and surety bonds signed by Southern Surety Company set forth in plaintiff's pleadings herein; that on or about December tenth, 1923, plaintiff filed herein its first amended original petition wherein are set forth and contained substantially the identical allegations as are now set forth in its second amended original petition, which said first amended original petition of plaintiff is here now referred to and made a part hereof, the same as if fully and at large set out herein for the purpose of disclosing the allegations therein contained.

9.

This defendant adopts and makes a part hereof the allegations contained in paragraphs VII, VIII, IX and XII of the first amended original answer herein of H. O. Head, executor of the estate of H. W. Head, deceased.

Premises considered, this defendant prays that plaintiff be denied any relief herein against it and that this defendant have judgment against plaintiff city for the causes of action above set forth and upon the warrants and coupons set forth in its Exhibit "A" hereto

attached, principal, interest and costs and for such other and further relief, general and special, as to the court may seem proper.

ELCOCK & MARTIN,
THOMPSON, KNIGHT, BAKER & HAINES,
*Counsel for Defendant Brown-Crummer Investment Company.*

Endorsed:

D. L. No. 241. Defts First Amended Original Answer. Brown-Crummer Investment Co. Filed May 17, 1926 F. A. King, Clerk. By J. R. Blades, Deputy.

EXHIBIT "A."

| | |
|---|---|
| Warrant No. 7, due March 1, 1924 | $1 000 00 |
| Warrant No. 8, due March 1, 1924 | 1 000 00 |
| Coupon No. 9, detached from warrants Nos. 7 to 50, 44 at $30 00 each, due March 1, 1924. . . . . | 1 320 00 |
| Coupon No. 10, detached from warrants Nos. 9 to 50, 42 at $30 00, each, due September 1, 1924. . . . . | 1 260 00 |
| Coupon No. 11, detached from warrants Nos. 9 to 50, 42 at $30.00 each, due March 1, 1925 . . . . . | 1 260 00 |
| Warrant No. 9, due March 1, 1925 | 1 000 00 |
| Warrant No. 10, due March 1, 1925 | 1 000 00 |
| Warrants 11 and 12 due March 1, 1925 | 2 000 00 |
| Coupon No. 12, detached from warrants Nos. 11 to 50, 40 at $30 00 each, due September 1, 1925. . . . . | 1 200 00 |

Coupon No. 13, detached from warrants Nos. 11 to 50, 40 at $30 00 each, due March 1, 1926. . . . . 1 200 00

**Second Amended Original Answer of Defendant, Southern Surety Co.**

*In the District Court of the United States,*

*Eastern District of Texas, Sherman, Texas.*
*City of Gainesville,*

vs.

*Southern Construction Company et al.*

Now comes Southern Surety Company, one of the defendants herein, and on leave of court amends its original answer and its first amended original answer heretofore filed in this cause, and files this, its second amended original answer for and in lieu of all other pleadings by it filed herein, and for same says:

Defendant demurs generally to the plaintiff's third amended original petition and says that same is insufficient to require this defendant to answer further of which it prays the judgment of the court.

For its first special exception to plaintiff's said third amended original petition, this defendant says that there is pleaded and set forth by the plaintiff as a basis for this cause of action against this defendant two alleged obligations executed by this defendant as surety for H. W. Head, payable to the City of Gainesville, Texas, and being conditioned in respect to any dispute, discrepancy or other contingency which might arise which might in any way affect the amount of

work done or materials furnished by Southern Construction Company so as to in any way affect certain warrants delivered to one H. W. Head, and plaintiff further pleads that there did arise a dispute, discrepancy and contingency which did affect the amount of work done and material furnished so as to affect said warrants and that said matters did affect said warrants but plaintiff nowhere in said pleading sets up how or in what manner said warrants were affected, and how or in what manner said dispute, discrepancy or contingency did affect said warrants nor what such effect was and said pleading is wholly insufficient to apprise this defendant of what it will be called on to answer. The allegations that there did arise a dispute, discrepancy or contingency which affected the amount of work so done or material furnished so as to affect said warrants alleged to have been delivered, is a mere legal conclusion and statement.

Defendant further specifically adopts the special exceptions of its co-defendant, H. O. Head, executor of the will of H. W. Head, deceased, as though said exceptions were here copied at length.

Answering, if answer be required, this defendant denies each and every allegation in said plaintiff's third amended original petition and demands strict proof thereof.

This defendant respectfully shows to the court that its liability herein, if any, is that of surety only as disclosed by the plaintiff's pleading and it here specifically adopts all the special answers of its co-

defendant, H. O. Head, executor, as aforesaid. This defendant further specifically adopts the pleading and answer of the plaintiff, the City of Gainesville, insofar as said answer assails the legality of the warrants involved, but not otherwise.

For its first special and separate answer, this defendant denies that the document referred to in paragraph 9 of plaintiff's said third amended original petition was intended to bear date of October 20th, 1920, or that the reference to the obligation of H. W. Head of September 10, 1920, was intended to be October 4th, 1920, and says that in truth and in fact this defendant intended to execute and did execute such document as the same is written and dated and not otherwise.

For its second special and separate answer, this defendant says that if, in truth and in fact, the Southern Construction Company became indebted to the city for water furnished, truck rental, engineering fees, or other items of any and every kind whatsoever, as alleged in plaintiff's third amended original petition, this defendant says that it never assumed and never had any liability to plaintiff in respect to such items and is not now liable therefor.

For its third special and separate answer, this defendant says that if it be true as alleged by plaintiff, that H. W. Head was a member of the partnership doing business under the name of the Southern Construction Company, this defendant had no knowledge of such fact and is in no wise responsible for any

liability that might be alleged or established against the said Head by virtue of said partnership.

For its fourth special and separate answer to plaintiff's third amended original petition and particularly with respect to the matters alleged in paragraph 19 of said petition, this defendant says that if, in fact, there was made between plaintiff, H. W. Head and the Southern Construction Company any agreement with respect to the rights of said parties, it was in no wise a party thereto and had no notice or knowledge of same and was in no wise bound thereby. That if this defendant's principal, H. W. Head, assumed or admitted a liability to the plaintiff, then that such assumption was a new and independent undertaking and agreement on the part of the said H. W. Head and the said Southern Construction Company. That if, in fact, such transaction did occur, it was entered into long after the execution of any of the obligations alleged to have been executed by this defendant and this defendant in no wise participated in same and had no knowledge of same and said liability, if any was created or admitted as alleged, was not and is not covered by the terms of any of the obligations of this defendant and was a new and independent contract between the parties and for which this defendant was not and is not liable. This defendant specially denies that the said H. W. Head was attorney for the Southern Surety Company, this defendant, and denies that he had any authority to act for this defendant and this defendant says, in truth and in fact, that said H. W. Head was

never attorney for this defendant and was never clothed with and never had any authority to act for it or to bind or attempt to bind it by the terms of any alleged agreement claimed to have been made with the said plaintiff as set out in said paragraph 19 of its said third amended original petition.

For its fifth special and separate answer and prayer for permanent relief, this defendant says that if it be held liable herein for any amount, then that such liability exists solely by reason of its suretyship for H. W. Head as disclosed by the entire record herein and if any liability be adjudged against this defendant, it prays that it have judgment over against its co-defendant, H. A. Head, as executor of the estate of H. W. Head, deceased, for the amount of said liability so adjudged.

Premises considered, this defendant prays that plaintiff take nothing by its suit herein and it prays for such relief general and special in law or in equity that it may in this behalf deserve.

Jno. T. Suggs,
*Attorney for Defendant,*
*Southern Surety Company.*

Endorsed:

No. 241. City of Gainesville vs. Southern Const. Co. et al. Second Amended Original Answer of Deft. Southern Surety Co. Filed May 17, 1926. F. A. King, Clerk. By J. R. Blades, Deputy.

**Plaintiff's First Amended Supplemenal Petition.**

*In the District Court of the United States for the Eastern District of Texas*

*Sherman Division.*

*No. ....*

*City of Gainesville, Plaintiff,*

**vs.**

*Southern Construction Company, et al., Defendants.*

Now comes the plaintiff and with leave of the court amends its replications and supplemental petitions to the answer of any one or more of the defendants heretofore filed so as to read as follows:

1.

The plaintiff denies each and every allegation in the answers of each and all of the defendants except where hereinafter expressly admitted.

For further reply to said answers, the plaintiff says:

1.

The Southern Construction Company, hereafter called the contractor, had no valid contract with the plaintiff for the paving of any of its streets.

By Section 28, Article 2 of Plaintiff's Charter, it is prescribed that no contract shall be let for paving or other public improvement involving an outlay of as much as $250.00 unless based upon specifications prepared, submitted to and approved by plaintiff's mayor and city council, and pursuant to competitive bidding

advertised for as therein directed, nor could any except sealed bids be received and after being received they were required to be opened by the mayor in the presence of the council and to remain on file in his office open to public inspection for at least forty-eight hours before any award be made to any competitive bidder. In disregard of this provision of the charter, the plaintiff's council awarded the contract in question to the Southern Construction Company within less than twenty-five hours after the bids were opened.

2.

The specifications, as well as instructions to bidders, prescribed that the successful bidder should furnish a bond in the amount of his bid with good and sufficient sureties satisfactory to the plaintiff's council. In their bids for the proposed work, the said contractor, as well as the other bidders, bound itself on the acceptance of the bid to execute a contract and bond for performance and completion of the proposed work, and to pay for the work and material entering therein, and to keep the same in a state of repair for a period of five years from its acceptance by the plaintiff. By the specifications and instructions to bidders, the abutting lot owner was required to pay for curbs and gutters and three-fourths of the paving between street intersections, while the plaintiff was required to pay for the street intersections and one-fourth of the remaining cost according to the front foot plan or rule. By such specifications and instructions, the contractor or successful bidder was required to execute to the

plaintiff its bond with good and sufficient sureties in the sum of twenty-five per cent of the entire cost, conditioned that the contractor would well and truly keep such improvements in good repair, reasonable wear and tear excepted, for a period of five years.

The above provisions contained in the instructions to bidders, as well as in the specifications increased the cost of the work and necessarily influenced those seeking the contract to bid higher than they otherwise would, notwithstanding which, plaintiff's council within less than twenty-five hours after the opening of the bids, awarded the contract to the Southern Construction Company leaving off the maintenance bond, the construction bond and the bond exacted by the statute for the payment of the work and material entering into the construction of the improvement. But in lieu of said bonds, it was agreed that the Southern Construction Company should pledge to the city collateral securities aggregating $5000.00, but soon thereafter in lieu of the proposed collateral, the contractor executed a bond in the sum of $5000.00, conditioned to perform the contract and to pay for the work and material used in completing it. The contractor give no other or different bond. The bonds given and the obligation to maintain the work for five years, rendered the contract more burdensome and influenced the minds of competitive bidders in bidding for the work and were material provisions. After determining to leave off the bonds and the obligation for maintenance, the city let the modified contract to the Southern Construction Com-

pany without readvertising for bids and without inviting competitive bidding, and the contract as finally made is and was null and void because let without competitive bidding in violation of the charter.

3.

Warrants 1, 2 and 3 issued pursuant to the resolution of September 7th, 1920, and constituting a part of the fifty warrants mentioned in the pleadings, were for tarvia paving and have been paid, and also warrants 4, 5, and 6 issued under the resolution of November 16th, 1920, leaving forty-four of said warrants yet unpaid.

At the time of the issuance of said forty-four warrants, no paving had been done under said contract except some tarvia paving, which had been accepted by plaintiff's council and paid for, the city's part of which amounted to only $3000.00. The contractor being without credit and endeavoring to do paving work without bond to pay for the work and material used in its construction, was unable to purchase material or to secure labor. In advance of the performance of the work or its acceptance but in pursuance of a scheme devised by the Brown-Crummer Investment Co., hereafter called the Investment Co., to evade the law, said Investment Co. prepared resolution for the issuance of such warrants falsely reciting that the work had been done and had been inspected and accepted, when no work had been done, no inspection had been made and no acceptance had, for material not bought and work not done could not be inspected or accepted. The re-

citals in said pretended resolution were untrue and known to be untrue by said Investment Co. and all connected therewith. While said resolutions were passed and said warrants issued during the fall of 1920, no work was done until the spring and summer of the following year. The total paving done by the Southern Construction Company under its contract with the plaintiff including the tarvia paving, amounted to the sum of $34735.29, leaving $15264.71 represented by said warrants for which the plaintiff received no consideration. All of said warrants are illegal and void, because issued, not to evidence any debt owing from the plaintiff to the contractor, but were issued at a time when the plaintiff was not indebted to the Southern Construction Company to any amount, but upon the expectation that the contractor would thereafter do paving under its contract to the amount of said warrants, but the contractor failed to place paving the city's part of which amounted to said warrants, but lacked $15264.71 of so doing under the contract the city's part was to be paid for as the work progressed after inspection and acceptance, the city retaining 10% until full performance.

4.

Under Article 4 of plaintiff's charter, it is provided that no bonds shall be issued for any purpose in excess of $2500.00 unless an election be ordered by the mayor and city council and at such election the majority of the votes should be in favor of creating such

debt. In said section, the council is given authority by ordinance duly passed to borrow money on credit of the city for the permanent improvement of its streets, avenues and alleys, and may issue bonds for that purpose, but subject to the limitation that if the proposed bond issue should exceed $2500.00 the same must be submitted to the voters of the city. While said pretended warrants are warrants in name, they are bonds in form and in substance, and are a subterfuge to evade the provision of the charter against the issuance of bonds in excess of $2500.00 unless authorized by a vote of the people. Said Investment Co. not only knew at all times that said warrants were issued unlawfully and without any consideration, but said Investment Co.'s agents were travelling through Texas posing as experts possessing the skill to teach mayors and aldermen how to adroitly evade the constitution, the statute and the charter in creation of debt.

Said pretended warrants are not negotiable paper under the law merchant, and no one could acquire the same otherwise than subject to any defense the plaintiff may have thereto.

5.

The supplemental contract mentioned in the answer of the Investment Co., as well as the ordinance of ratification, evidence a contract materially different from that bid on and show a contract let without competitive bidding and are void. The ordinance of ratification as well as that authorizing the original contract were passed upon the day introduced in disregard of Section

19, Article 9 of the Charter, prescribing that all ordinances passed by the council shall be read upon three several days, and in disregard of Section 6, Article 7 of the Charter saying that no ordinance shall be passed finally on the day it was introduced, and in disregard of Section 19, Article 9, and Section 6, Article 7 prescribing that the above rules cannot be suspended except by a majority of a full board, and in disregard of that provision of Section 6, Article 7 saying, "The ayes and nays shall be taken upon the passage of all ordinances and resolutions and entered upon the journal of its proceedings." The rules were suspended, if at all, in reference to said ordinances without a roll call and without an aye and nay vote being taken or entered on the journal.

6.

Section 29 of Article 2 of Plaintiff's Charter requires a good and sufficient bond of all contractors with at least two good and sufficient sureties thereon. The contract in question called for an expenditure of approximately $200,000.00 including the amount coming from abutting lot owners, while the only bond given was in the sum of $5000.00, which was grossly insufficient and known to be such at the time by all parties concerned and was a mere subterfuge to evade the charter requirements.

7.

The allegations in the answer of defendant Head in reference to the provisions of plaintiff's charter con-

cerning the permanent improvement of streets and the manner of paying therefor are substantially true and are adopted by the plaintiff with this qualification. During the month of October, 1919, there was an attempt to amend plaintiff's charter by adopting Title 11, Chapter 22 of the Revised Statutes of 1911, known as the State Paving Law, but at the election held for that purpose, the question was submitted not to the qualified voters of the city, but only to such of them as were property taxpayers, in disregard of Section 5, Article 11 of the Texas Constitution, known as the home rule amendment, requiring proposals to adopt or amend, a charter be submitted to the qualified voters of the city at an election to be held for that purpose. Said attempt to make said State Paving Law part of the charter was ineffectual for many other reasons, but had said paving law been lawfully adopted, it conflicts with the provisions of the plaintiff's charter in reference to paving quoted in the answer of defendant Head, and to the extent of the conflict is inapplicable. The contract in question requires that the abutting lot owners pay for three-fourths of the paving between street intersections while the charter requires that they pay only two-thirds. The contract in question requires the abutting lot owners to pay for their prorata of the cost in three equal installments, one on demand after acceptance of the work, and the others in one and two years, while the charter prescribes that the amount assessed against the abutting lot owners shall be collected in equal annual installments not less

than five in number. The above paving contract and all proceedings thereunder for the above as well as for many other reasons are and has ever been void.

7a.

The contract in question, as well as the specifications and instructions to bidders, in disregard of that provision of the charter for the letting of contracts to the lowest responsible bidder, required the contractor in the construction of the improvement to give preference in employment to the citizens of the city and where they were not available, to citizens of the State of Texas, which provisions were taken into consideration by those bidding for the work and caused them to bid higher than they otherwise would, thereby rendering said contract void.

8.

The facts alleged in this supplemental petition the plaintiff is ready to verify, but the validity or invalidity of the contract and warrants in question is for the decision of the court. In case said warrants are held to be invalid, the plaintiff prays for judgment so declaring, but in case they are held to be binding and enforceable, the plaintiff prays judgment against defendant Head and the Southern Construction Company for the amount of the warrants for which it received no consideration, with interest at six per cent per annum from the date of the filing of this suit, and for

such other relief against the defendant Head and said Surety Co. as it may be entitled to in the premises.

CECIL MURPHY,
W. O. DAVIS,
*Attorneys for Plaintiff.*

*The State of Texas, County of Cooke.*

I, J. Z. Keel, on oath say that I am Mayor of the City of Gainesville, and that the allegations contained in the foregoing amended supplemental petition are true.

J. Z. Keel.

Sworn to and subscribed before me, this the 12th day of May, 1926.

Georgia Fisher,
Notary Public for Cooke County, Texas.
(Seal)

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co., et al. Plaintiff's First Amended Supplemental Petition. Filed May 17, 1926 F. A. King Clerk. By J. R. Blades, Deputy.

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**Third Supplemental Answer of Defendant, Head.**

*In District Court of U. S. for Eastern District of Texas at Sherman.*

*City of Gainesville,*

vs.

*Southern Construction Co. et al.*

Now comes defendant, H. O. Head, executor, and, with leave of the court files this supplemental answer,

and in reply to plaintiff's third amended petition filed .... day of ...., 1926, and to plaintiff's supplemental petition filed .... day of ...., 1926, and to defendant, Brown-Crummer Investment Company's amended answer filed .... day of ...., 1926, and to all pleadings filed by plaintiff and said defendant, Brown-Crummer Investment Company, and says:

I.

He adopts all demurrers, and reaffirms all allegations contained in his amended answer filed before the removal of this case from the State Court to this court, and he also adopts all the allegations contained in plaintiff's said supplemental petition which challenge, or call in question, the validity of said alleged warrants.

II.

This defendant denies all allegations contained in plaintiff's said third amended petition which are not expressly admitted in his pleading herein filed, and says he especially denies that H. W. Head ever promised or agreed to pay plaintiff any part of any debt or obligation which either the Southern Construction Company, or Harry D. Levy or Lester Levy owed to it, and says if any such promise or agreement was ever made it was without consideration, was not in writing but was only verbal, was made more than two and more than four years before the institution of any suit thereon by plaintiff, was never legally binding upon said H. W. Head and plaintiff's cause of action thereof, if any it ever had, is barred by our statutes of limitation of two and four years.

III.

This defendant denies that H. W. Head was a partner in the Southern Construction Company, or with either Harry D. Levy or Lester Levy.

I, H. O. Head, one of the defendants as executor of H. W. Head's will, do swear that the facts set forth in Section III of the foregoing supplemental answer wherein it is denied that H. W. Head was a partner in the Southern Construction Company, or with Harry D. Levy or Lester Levy, are true.

H. O. Head.

Sworn to and subscribed before me this 6th day of May, A. D. 1926.

Marguerite Reeves,
Notary Public in and for Grayson County, Texas.

(Seal)

IV.

This defendant says that even if it be held that the Act of May 10, 1909, known as the General Paving Law, was applicable to the City of Gainesville the alleged warrants are and were invalid, null and void, for that by Sections 3 and 4 of said act it is provided:

"That the governing body of any city shall have the power to order the improvement of any highway therein, or part thereof, and to select the materials and methods for such improvement, and to contract for the construction of such improvements in the name of the city, and to provide for the payment of the cost of such improvements out of any available funds of the city or as herein provided.

That the cost of making such improvements may be wholly paid by the city, or partly by the city and partly by owners of property abutting thereon; provided, that in no event shall more than three-fourths of the cost of any improvement, except sidewalks and curbs, be assessed against such property owners or their property; but the whole cost of construction of sidewalks and curbs in front of any property may be assessed against the owner thereof or his property."

And this defendant says that the governing body of said city did not, before it entered into the alleged contract with the Southern Construction Company, order the improvement of any of the highways or streets therein, and select the materials and methods for such improvement, and especially did not before entering into said contract designate the particular highways or streets that were to be included in said contract, but on the contrary, said contract only applied to the prices to be paid for such work as might be done upon any highways or streets as might thereafter be designated, and all work that was done thereunder was upon streets that were designated by the city from time to time long after the contract fixing prices was entered into, and long after whatever instruments called warrants that were executed by the city had been executed by it.

Defendant further says that by the said General Paving Law the city was not empowered to contract to pay for the improvement of its streets by the issuance of time warrants or obligations of the kind in question,

but was only authorized, "to provide for the payment of the cost of such improvements out of any available funds of the city or as provided herein," the term "as provided herein" having reference to special assessments against benefited property owners.

Wherefore this defendant prays that he be dismissed with his costs, and for general relief.

HEAD, DILLARD, SMITH, MAXEY & HEAD,
*Attorneys for Defendant Head.*

Endorsed:

No. 241 In District Court of U. S. Eastern District of Texas, at Sherman. City of Gainesville, vs. Southern Construction Co. et al. Defendant's Supplemental Third Answer. Filed May 17, 1926 F. A. King Clerk By J. R. Blades, Deputy.

**Agreement and Stipulation of Parties.**

*In the District Court of the United States for the Eastern District of Texas, Sherman Division.*

*No.* 241 *Law.*

*City of Gainesville,*

vs.

*Southern Construction Co. et al.*

It is admitted and stipulated by the parties as follows:

1.

This suit was brought in the District Court for Cooke County, Texas, on October 11th, 1921, by the City of Gainesville (a Texas municipal corporation) against the Southern Construction Co. (a partnership composed

of Lester Levy and Harry D. Levy), the Southern Surety Co. (an Iowa corporation), and H. W. Head (a citizen of Texas residing in Grayson County).

Default judgment in said cause was rendered by said court in favor of the plaintiff against all defendants for $15000.00 and against the Southern Construction Co. for $4090.00, which judgment upon appeal by said Head and said Southern Surety Co. was reversed by the Court of Civil Appeals for the Sixth Supreme Judicial District as to said Head and said Southern Surety Co., but was affirmed as to said Southern Construction Co. See *Head* v. *City of Gainesville*, 254 S. W. 323. Upon the remand of said cause to the District Court for Cooke County, H. O. Head, as executor, made himself a party in lieu of H. W. Head who had died in the meantime and he and the Southern Surety Co. filed an answer to the petition. Thereupon, the plaintiff amended its petition making Brown-Crummer Investment Co. a Kansas corporation a party defendant, and said Brown-Crummer Investment Co. within the time allowed by law filed its petition to remove said cause to this court upon the ground of a separable controversy. After a transcript of the proceedings were filed in this court, a motion to remand made by the plaintiff was overruled. All parties having repleaded in this court with the exception of the Southern Construction Co. which did not appear, it is agreed that the transcript of the proceedings in the district court as well as all abandoned pleadings may be omitted by the clerk in making out the record for the circuit court of appeals, as immaterial.

2.

The plaintiff contemplates carrying this cause to the circuit court of appeals for the fifth circuit by writ of error, and the parties in case a writ of error is allowed and citation issue, waive the service of citation and acknowledge full and complete notice of said proceedings.

This June 3rd, 1926.

CECIL MURPHY,
W. O. DAVIS,
*Attorneys for Plaintiff, the City of Gainesville.*

HEAD, DILLARD, SMITH, MAXEY & HEAD,
*Attorneys for H. O. Head, Executor.*

JNO. T. SUGGS,
*Attorney for Defendant, Southern Surety Co.*

THOMPSON, KNIGHT, BAKER & HAINES,
*Attorneys for Defendant, Brown-Crummer Investment Co.*

It is further stipulated by plaintiff and Brown-Crummer Investment Company that upon the remand of this cause from the Court of Civil Appeals to the District Court of Cook County, Texas, the defendant Head answered, alleging that the warrants in question were illegally issued, void, and of no value, and thereafter, on December 10, 1923, the plaintiff filed its first amended original petition, making Brown-Crummer Investment Company a defendant, and alleging that the warrants constituted valid, legal and binding promises and obligations of the plaintiff; and the plaintiff further pleaded,

in the alternative, that if it be true that said warrants were not valid, which the plaintiff denied, and the court should hold that said warrants are void, then the plaintiff, in said pleading, prayed that the warrants be cancelled and declared void.

CECIL MURPHY,
W. O. DAVIS,
*Attorneys for Plaintiff, the City of Gainesville.*
THOMPSON, KNIGHT, BAKER & HAINES,
*Attorneys for Defendant, Brown-Crummer Investment Company.*

Endorsed:

No. 241 D. L. City of Gainesville vs. Southern Construction Company, et al. Admission, Stipulation and Waiver. Filed June 28, 1926. F. A. King, Clerk. U. S. District Court. By Mrs. E. S. Hughes, Deputy.

**Verdict of Jury.**

*City of Gainesville,*

vs.

*Southern Construction Company, et al.*

We, the jury, find in favor of Brown-Crummer Investment Company against the plaintiff, City of Gainesville, in the sum of $13,125.40 dollars, with interest thereon at the rate of six per cent per annum from date hereof, together with all costs.

We further find in favor of H. O. Head, executor of the estate of H. W. Head, deceased, and Southern Surety Co. upon the causes of action asserted by the City of Gainesville against them.

We further find that none of the parties herein take anything against any of the other parties herein except as aforesaid.

S. R. Little,
Foreman.

Endorsed:

D. L. No. 241. City of Gainesville vs. Southern Surety Co. et al. Instructed Verdict. Filed May 20, 1926. F. A. King, Clerk. By J. R. Blades, Deputy.

**Judgment.**

*In the District Court of the United States for the Eastern District of Texas, Sherman Division.*

*No. D. L. 241.*

*City of Gainesville,*

**vs.**

*Southern Construction Co. et al.*

On this the 20th day of May, 1926, this cause came on for trial; whereupon the plaintiff announced that it would no longer prosecute this cause as to the defendants Southern Construction Company and Harry D. Levy and Lester Levy, composing said company. It is therefore ordered that said Southern Construction Company and the said Harry D. Levy and Lester Levy be and they are hereby dismissed from this cause. Thereupon all parties hereto announced ready and thereupon came a jury of twelve men, consisting of S. R. Little and eleven others, who were duly impaneled and sworn; and after hearing the evidence and argument of counsel the court instructed the jury to return a verdict as follows:

"We, the jury, find in favor of Brown-Crummer Investment Company against the plaintiff, City of Gainesville, in the sum of thirteen thousand, one hundred and twenty-five dollars ($13,125.00), with interest thereon at the rate of 6% per annum from date hereof, together with all costs.

"We further find in favor of H. O. Head, executor of the estate of H. W. Head, deceased, and the Southern Surety Company upon the causes of action asserted by the City of Gainesville against them.

"We further find that none of the parties herein take anything against any of the other parties herein except as aforesaid."

Thereupon the jury returned their verdict in form, words and figures as so instructed by the court.

It is therefore the judgment and decree of the court that the defendant, Brown-Crummer Investment Company, do have and recover against the plaintiff, the City of Gainesville, the sum of thirteen thousand, one hundred and twenty-five dollars ($13,125.00), with interest thereon at the rate of 6% per annum from date hereof and all costs of this suit, for which let them have their execution and all proper process for the enforcement hereof.

It is further the judgment of the court that the plaintiff, City of Gainesville, take nothing against the defendant, H. O. Head, executor of the estate of H. W. Head, deceased, nor against the defendant, Southern Surety Company, upon any of the causes of action asserted by said plaintiff against them, or either of them,

and that the said defendants, Head and Southern Surety Company, do have and recover against the plaintiff all costs by them in this behalf incurred, for which let execution and all proper process be issued.

It is further the judgment of the court that none of the parties herein take anything against any of the other parties herein except as aforesaid.

It is further the judgment of the court that execution issue against each and all of the parties herein in favor of the officers of this court for the costs by said respective parties incurred, for the recovery of which let execution and all proper process issue.

It is further the order and judgment of the court that the plaintiff, City of Gainesville, be given forty-two (42) days in which to file motion for new trial, and ninety (90) days from the date hereof in which to file bills of exceptions.

It is further ordered that the above dismissal as to the Southern Construction Company and Harry D. Levy and Lester Levy shall in no manner affect the separate judgment recovered by the plaintiff against them in the District Court for Cooke County, Texas, and afterwards affirmed by the Court of Civil Appeals.

Endorsed:

No. D. L. 241. City of Gainesville vs. Southern Construction Co. et al. Judgment Rendered May 20th, 1926. Filed May 20, 1926. F. A. King, Clerk. By J. R. Blades, Deputy.

## Bill of Exceptions.

*In the District Court of the United States, for the Eastern District of Texas, Sherman Division.*

*No. B. L. 241.*

*City of Gainesville,*

*vs.*

*Southern Construction Co. et al.*

Be it remembered, that the above entitled cause came on for trial on the 17th day of May, 1926, being the first day of the May term of said court, before the Hon. W. Lee Estes, the judge of said court, and a jury duly impanelled, and thereupon, the following, among other proceedings, were had:

### Plaintiff's Evidence.

Charter of the City of Gainesville.

Plaintiff, the City of Gainesville, and the defendants, Brown-Crummer Investment Co., H. O. Head, administrator of the estate of H. W. Head, deceased, and the Southern Construction Company, offered in evidence the charter of the City of Gainesville as evidenced by the special act of the Texas Legislature approved March 17th, 1909, Special Laws of the 31st Legislature, pages 501 to 543 inclusive, and which thereafter, but during the same year, was adopted by vote of the people.

The provisions of the charter, having any bearing upon the questions at issue, are as follows:

a. That provision of Section 28, Article 2, saying: "All contracts, of whatever character, pertaining to

public improvements, or the maintenance of public property of said city, involving an outlay of as much as two hundred and fifty dollars ($250) shall be based upon specifications to be prepared and submitted to and approved by the mayor and city council, and after approval by the mayor and city council, advertisement for the proposed work, or matters embraced in said proposed contract, shall be made, inviting competitive bids for the work proposed to be done, which said advertisement shall be put in a daily newspaper not less than ten times. All bids submitted shall be sealed and shall be opened by the mayor in the presence of a majority of the aldermen, and shall remain on file in the mayor's office and be opened for public inspection at least forty-eight hours before any award for said work is made to any competitive bidder. The council shall determine the most advantageous bid for the city, and shall enter into contract with the party submitting the lowest secure bid, but shall always, in every advertisement of public work or contract involving as much as $250, reserve the right to reject any and all bids. Pending the advertisement of the work or contract proposed specifications therefor shall be on file in the office of the mayor, subject to the inspection of all parties desiring to bid."

b. Section 29, Article 2, saying: "The council shall require good and sufficient bonds of all contractors, with at least two good and sufficient sureties, who shall be residents of the State of Texas. No non-residents of the state shall ever be received as surety on any bond payable to the City of Gainesville, except such guaranty

companies as may be satisfactory to the city council. When bondsmen are not residents of Cooke County, such proof of their solvency may be required as the council may deem necessary.

c. Section 1, Article 4, saying: "The city council of the City of Gainesville shall have power and authority by ordinance duly passed if it so elects to borrow money on the credit of the city for permanent improvements, for public buildings, for the permanent improvements of its streets, avenues, alleys, public grounds, building of sidewalks, macadamizing, remacadamizing, paving and repaving of streets, alleys, avenues and public grounds and for the purpose of providing the city with funds for the ownership of public utilities, including water, light, sewer, and gas works; and the city council may issue bonds for the City of Gainesville for all or any of the above purposes to any amount not exceeding $150,000.00 in any one year; provided, that in addition the said city is expressly authorized to issue bonds for the purpose of refunding the bonds of the city previously issued; provided, that the bonds be refunded at the same or a lower rate of interest than the bonds proposed to be retired draw. It is further provided that debt shall never be created by the City of Gainesville unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon.

"No bonds shall be issued for any purpose except the purposes above named which shall not exceed $150,-

000 for any one year and for the purpose of refunding bonds previously issued.

"No bonds shall be issued for any purpose in excess of $2500 unless an election be ordered by the mayor and city council, and if at said election the majority of the votes polled shall be in favor of creating such debt it shall be lawful for the city council to make the issuance of the bonds as proposed in the ordinance submitting the same at the election, at the election so held, but if a majority of the votes polled shall be against the creation of such debt, it shall be unlawful for the city council to issue the bonds.

"In all elections determining the expenditure of money for the assumption of debt only those shall be qualified to vote who pay taxes on property in said city and are legally qualified voters therein.

"No bond shall be issued drawing more than five per cent interest and they shall be invalid if sold for less than par and accrued interest, and all bonds shall express upon their face the purpose for which they are issued.

"The ordinance authorizing any bonds to be issued shall provide for the creation of a sinking fund sufficient to pay the bonds at maturity and make provisions for payment of interest thereof as it matures and said sinking fund may be invested in the bonds of the State of Texas or in bonds issued by the counties of the State of Texas or such funds may be used for the purchase of bonds of the City of Gainesville which are not yet due, and neither interest or sinking fund shall be devoted to any other purpose whatever."

d. Section 3, Article 4, saying: "Provided, that said city may issue not exceeding $2500 in bonds when authorized by law so to do without holding an election for that purpose."

e. Section 16, Article 9, saying: "In addition to the other powers of the city council herein mentioned, it shall of its own motion, and the council is hereby invested with full power and authority to grade, gravel, pave or otherwise improve any street, avenue or other public highway, or any portion thereof within the limits of said city, whenever by a vote of a majority of the aldermen present they may deem such improvement for the public interest. And the amount for which said city is liable for said improvements and the amount for which the abutting property owners shall be liable and the manner of ascertaining the amount for which the city and property owner shall be liable for any such improvements and the manner of fixing the liens upon the property abutting upon such improvements, and the enforcement of such lien and the number of payments to be made, etc., as is fully set out in Chapter 9, Title 18; and Articles 544, 545, 546 and 547 of the Revised Statutes of the State of Texas (now Articles 1082 to 1085 inclusive of present Revised Statutes) are hereby adopted and re-enacted. It being intended by this section that the above articles of the Revised Statutees of the State of Texas shall in nowise be repealed by this act or in any manner amended or qualified, but the City of Gainesville is hereby given the power and authority to cause its streets and alleys and other public highways to be improved in the

manner herein mentioned and mentioned in said articles and all the aforesaid sections of the Revised Statutes of Texas shall remain in full force and as effective as if this charter had not been granted."

f. That portion of Section 19, Article 9, saying: "The provisions of this act shall be liberally construed, with the view to carry out the purposes of this charter, and in case of doubtful construction, it shall be resolved in favor of the city."

g. Section 13 of Article 9, saying: "This act shall be deemed a public act and judicial notice shall be taken there in all courts."

h. Section 19 of Article 9, saying: "All ordinances passed by the city council or which amends or repeals an ordinance now in existence shall be read upon three several days to the council unless a majority of the full board shall vote to suspend this rule."

i. Section 10, Article 7, saying: "For the purpose of conducting and transacting the ordinary business and administrative affairs of the city, the council shall meet in regular session the first and third Tuesday in every month and is also subject to be convened at any time on the call of the mayor for a special session."

j. Section 6, Article 7, saying: "The city council shall set with open doors, shall keep a journal of its proceedings, which shall be public and constitute one of the archives of the city. The council shall act only by ordinance, resolution or motion * * *. The ayes and nays shall be taken upon the passage of all ordinances or

resolutions and entered upon the journal of its proceedings, and every ordinance, resolution or motion shall require on final passage the affirmative votes of a majority of all the members of the city council present. No ordinance shall be passed finally on the date it is introduced, except in the case of public emergencies."

Obligation of H. W. Head to the City of Gainesville.

Plaintiff introduced the obligation of H. W. Head to the City of Gainesville, dated Sherman, Texas, September 10, 1920, and copied in the fifth paragraph of plaintiff's third amended original petition, filed April 13, 1926, which obligation relates to ten thousand paving warrants, which amended petition is referred to as showing the exact wording of said obligation; and in connection with the obligation of said Head, the plaintiff introduced the obligation of the Southern Surety Company to the City of Gainesville, dated the 20th day of September, 1920, and copied in the fifth paragraph of said amended petition, which is hereby referred to for the true wording of said obligation; and in this connection, the plaintiff introduced the obligation of H. W. Head to the City of Gainesville dated October 4th, 1920, and copied in the fifth paragraph of said amended petition, to which reference is made to the exact wording thereof, which obligation relates to thirty-seven thousand of Gainesville paving warrants therein mentioned, and the obligation of Southern Surety Co. dated September 20, 1920, following the obligation of said Head in said amended petition.

Instructions to Bidders.

Plaintiff introduced the instructions to bidders and the bid of the Southern Construction Co., and the contract between the Southern Construction Co., and the City of Gainesville, dated November 20, 1919, and the contract between the same parties and of the same date and the specifications attached and made a part of said contract, the same being as follows:

"Sealed proposals addressed to the city of Gainesville, Texas, will be received at the office of the Secretary until 8 P. M. November 18th, 1919, for furnishing all necessary material and machinery, and labor for the construction of certain street improvements for the city of Gainesville, Texas.

"Bidders must submit certified check in the sum of one thousand dollars ($1,000.00) payable without recourse to the order of Honorable E. N. Blackburn, mayor, as a guarantee that the bidder will enter into the contract and execute the bonds and guarantee agreement, in the forms provided herein within ten (10) days from the date of the notice of the award made to him by the above mentioned city. Bids without the required check will not be considered.

"Successful bidder must furnish bond in the amount of his bid, from a responsible Surety Company or from good and sufficient personal sureties, satisfactory to the above mentioned city.

All lump sum and unit prices must be stated in both script and figures. The above mentioned city reserves the right to consider the most advantageous

construction thereof or to eliminate the bid from consideration, as it may see fit. Unreasonable or unbalanced unit prices will subject the bid to elimination.

"Bidders are expected to inspect the site of the work and to inform themselves regarding all local conditions.

"Instruction to bidders, forms of proposals, plans and specifications, may be obtained at the office of the city engineer, R. G. Carraway Company, general consulting engineers.

"Gainesville, Texas, upon the deposit of $10.00 which will be returned upon the submission of a bona fide bid.

Bid of Southern Construction Company.

"*To the City of Gainesville, Texas.*

Gentlemen:

Pursuant to the foregoing instructions to the bidders, the undersigned bidder proposes to do all the work, furnish all the material upon which he bids, as provided by the attached plans and specifications, and binds himself on acceptance of his proposal to execute a contract and bond, according to the attached forms, for the performance and completion of the said work within the time specified and to keep said completed work in a state of repair for the period of five (5) years, from the date of completion and acceptance by the said city.

| Items | Written Prices | Figures |
|---|---|---|
| Price per sq. yd. for 3″ Vertical Fiber Brick pavement complete on a 5 inch concrete foundation | Three & 40/100 Dollars | $ 3.40 |
| Price per Sq. Yd. for 3″ Vertical Fiber Brick pavement complete on a 4 inch concrete foundation | Three & 20/100 Dollars | 3.20 |
| Price per square yd. for 2½″ Vertical Fiber Brick pavement complete on a 5 inch concrete foundation. | Three & 25/100 Dollars | 3.25 |
| Price per sq. yd. for 2½″ Vertical Fiber Brick pavement complete on a 4 inch concrete foundation. | Three & 05/100 Dollars | 3.05 |
| Price per sq. yd. for Tarvia treatment pavement complete on a 6 inch gravel foundation | One & 23/100 Dollars | 1.23 |
| Price per sq. yd. for ..... pavement complete on a .... inch ..... | | |

| | | |
|---|---|---|
| foundation. | (Blank) | |
| Price per sq. yd. for | | |
| ..... | | |
| pavement complete on a | | |
| .... inch ..... | | |
| foundation. | (Blank) | |
| Price per lin. ft. for | | |
| gravel concrete comb. | | |
| Curb and Gutter. | Seventy Five Cents | .75 |
| Price per lin. ft. for | | |
| stone concrete comb. | | |
| Curb and Gutter. | Eighty Cents | .80 |
| Price per lin. ft. for | | |
| gravel concrete | | |
| Separate Curb. | Fifty Cents | .50 |
| Price per lin. ft. for | | |
| stone concrete | | |
| Separate Curb. | Sixty Eight Cents | .68 |
| Price per lin. ft. for | | |
| gravel concrete | | |
| Separate Gutter | Forty Eight Cents | .48 |
| Price per lin. ft. for | | |
| stone concrete | | |
| Separate Gutter | Fifty seven Cents | .57 |
| Price per lin. ft. for | | |
| stone Separate Curb. | Forty Five Cents | .45 |
| Price per lin. ft. for | | |
| Oak Headers in place. | Fifty Cents | .50 |
| Price per Cu. Yd. for | | |
| Concrete in Culverts, etc. | Eighteen Dollars | 18.00 |

| | | |
|---|---|---|
| Price per lb. for reinforcing steel in Culverts, etc. | Thirty Five Cents | .35 |
| Price per cu. yd. for Earth excavation. | Seventy Five Cents | .75 |
| Price per cu. yd. for Rock excavation. | Three Dollars | 3.00 |
| Price per cu. yd. for Overhaul per 100 ft. | Two Cents | .02 |
| Price per pound for Culvert plates. | Twenty Five Cents | .25 |
| Price each for Catch Basins complete in place | Fifty Five Dollars | 55.00 |
| Price per sq. ft. for four inch cement walk. | Twenty Three Cents | .23 |
| Cost per day for common labor on extra work. | Four Dollars | 4.00 |
| Cost per day for Team labor on extra work. | Seven Dollars | 7.00 |

The undersigned bidder agrees to accept deferred payments on contracts with property owners in one (1) and two (2) years, and to charge interest on the same at the rate of eight (8) per cent per annum.

The undersigned bidder agrees to complete the work upon which he has bid, within 180 working days, from the acceptance of his bond by the city.

(Signed) Southern Construction Company,
By Harry D. Levy, Dallas, Texas.

## Contract Between the City of Gainesville and the Southern Construction Co.

*The State of Texas, County of Cooke.*

This agreement made and entered into this the 20th day of November, A. D. 1919, by and between the city of Gainesville, Cooke County, Texas, party of the first part, hereinafter called the city and the Southern Construction Company, of Dallas, Texas, party of the second part, hereinafter called the contractor:

Witnesseth: That for and in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the said party of the first part, and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed, the said party of the second part agrees with the said party of the first part to commence and complete the construction of certain street improvements and all extra work in connection therewith as stated in the general specifications, and at his own proper cost and expense to furnish all tools, materials, machinery, labor, supervision and other accessories necessary for the said construction in accordance with the conditions and prices stated in the proposal attached hereto, and in accordance with the plans and specifications therefor as signed by the parties hereto, all of which are made a part hereof, and all in the manner and under the conditions hereinafter specified:

All the provisions of this agreement shall be performed in the city of Gainesville, Texas, and any suit

to enforce its provisions or for damages for breach thereof shall be brought in Cooke County, Texas.

In witness whereof, the city has caused its seal to be hereto affixed, and these presents to be signed by its mayor and attested by its city secretary, and the party of the second part have hereto set their hands and seal on the day, month and year first above mentioned.

(Signed) The City of Gainesville, Texas,
Party of first part,
By E. N. Blackburn, Mayor.

Attest:

S. A. Bryan,
City Secretary.

The Southern Construction Company
Party of second part.
(Seal) By Harry D. Levy.

Witness:

R. G. Carraway.

Agreement Between the City of Gainesville, Texas, and the Southern Construction Co.

*The State of Texas, County of Cooke.*

This agreement made and entered into this the 20th day of November, A. D. 1919, by and between the city of Gainesville, Texas, party of the first part, hereinafter called the city, and the Southern Construction Company, of Dallas, Texas, party of the second part hereinafter called the contractor.

Witnesseth: That for and in consideration of the city having waived the construction and maintenance

bonds, and guarantee agreement hereinbefore mentioned. The said party of the second part hereby agrees that they will in lieu of the said construction and maintenance bonds and guarantee agreement place in any bank in said city of Gainesville, designated by the said city, the sum of five thousand ($5,000.00) dollars in lawful moneys of the United States of America, or the equivalent satisfactory to the said city, said sum of moneys to be subject to all of the terms of the plans and specification hereto attached, which are made a part hereof, as if the same were in fact the said construction bond. Said sums of moneys or securities shall be returned to the party of the second part on the completion and acceptance of the work by the party of the first part.

The said party of the second part further agrees that they will accept the legally issued warrants of said city at par, in payment for the proportion of the contemplated street improvements payable by said city.

In witness whereof the city has caused its seal to be hereto affixed, and these presents to be signed by its mayor and attested by its city secretary, and the party of the second have hereto set their hands and seal on the day, month and year first above mentioned.

The City of Gainesville, Texas,
By E. N. Blackburn, Mayor.

Attest:

S. A. Bryan,
City Secretary.

The Southern Construction Company
By Harry D. Levy.

(Seal)

Witness:
R. G. Carraway.

## General Specifications for Street Improvements.

*Plans and Specifications*:

The work shall be constructed according to the direction of the engineer and to conform accurately to the dimensions of the plans and to grades which he may furnish from time to time. The manner of construction shall be strictly in accordance with the specifications and plans or modifications thereof in writing by the engineer.

Any work or materials which may have been accidentally omitted in the description of the work, but which is clearly implied shall be furnished by the contractor the same as if it had been specifically stated.

## Interpretation of Specifications for Street Improvements.

All the work shall be done to the satisfaction of the engineer, who shall in all cases determine the amount, quality, acceptability and fitness of the several amounts of work and materials which are to be paid for, and shall decide all questions which may arise as to measurements of quantities, or fulfillment of this contract on the part of the contractor, and shall determine all questions respecting the true construction and meaning of the plans and specifications and his determination and decision thereon shall be final and conclusive and binding on both parties to this contract.

*Checking Plans*:

Before starting construction or ordering materials, machinery, or other equipment, the contractor is required to carefully check the plans, the engineer shall be furnished with a written statement listing errors found, and the plans will be corrected accordingly, should any additional errors be discovered afterwards, the cost of correcting the work must be borne by the contractor.

*Natural Conditions and Obstacles*:

Bidders are required to inspect the site of the work before tendering, and the contractor shall be responsible for any loss he may suffer by reason of failure to inform himself of all conditions affecting the work.

The contractor agrees that he will sustain all losses or damages arising from the action of the elements, the nature of the work to be done under these specifications, or from any unforeseen obstruction or incumbrance on the line of work which may be encountered in the prosecution thereof.

*Cleaning up*:

On completion of each part of the work all rubbish and unsightly material must be removed and disposed of as directed by the engineer, and the streets and grounds left in a neat condition.

*Prosecution of the Work*:

The contractor will commence work within ten days from the date that his bond is approved by the city,

and shall prosecute the work systematically and energetically, so that all the work embraced in this contract shall be entirely completed within the period stated in the proposal.

*Extension of Time*:

Upon the written application of the contractor extension of time will be allowed for unavoidable delays that result from unforeseen causes which, in the opinion of the engineer are undoubtedly beyond the control of the contractor or could not be reasonably anticipated, and for delays caused by specific orders of the engineer.

Said application shall be accompanied by formal consent of the sureties, but an extension granted, whether with or without such consent, shall in no way release the sureties from their obligation which shall remain in full force and effect until the discharge of this contract.

*Damage for Non-Completion*:

It is distinctly understood that the time specified for the completion of this contract is of the essence of the contract, and the contractor shall not be entitled to claim performance unless the work is entirely completed in every respect on or before date specified, or on or before the date to which the contract period is extended under the provisions of the foregoing section entitled, "Extension of time" of

these specifications, if any extension of time has been granted thereunder.

However, if the contractor does not have the work completed by the date specified, he may make application for an extension of time, stating in the application that he will liquidate the damages by such extension, said amount, as herein stated, shall be deducted from the moneys due or to become due the contractor, and from such moneys the city will pay the engineer.

It is understood and agreed by all parties that the amount of compensation to be paid the engineer by the city covers only the period stipulated in this agreement, and any additional compensation to be paid the engineer, is incurred by reason of default of the contractor, and shall be paid by said contractor as special and admitted damages.

It is hereby agreed and understood that said additional compensation shall be deemed and taken in all courts to be liquidated damages for the non-performance of the contract in the manner aforesaid, and not in the nature of a penalty.

It is understood and agreed that the sum of twenty-five ($25.00) dollars per day is the additional compensation to be paid the engineer for time on this contract in excess of the period stipulated in the proposal thereof.

*Maintenance of Contract*:

The contractor shall be governed by the instructions of the city in all matters relating to the blockad-

ing of the streets from traffic while the work is in progress, and he will not be allowed to obstruct traffic on more than two adjacent or consecutive city blocks at any one time without the written consent of the city.

The contractor shall pile such material as is necessary to store on the street during the progress of the work in neat piles in such a way as to least obstruct traffic, and no materials shall be piled on the sidewalks within fifteen feet of any fire plug. Upon completion of any section of street, all surplus materials or rubbish shall promptly be removed by the contractor.

*Permits:*

The city will in all cases give the right to use the streets and alleys. All other permits for securing materials, water, material yards, camp sites, right to use private property, including permits for crossing railroad tracks, and all such other permits as he shall desire, or which are necessary to the proper execution of the work must be secured by the contractor at his own expense.

*Character of Workmen:*

The contractor will employ competent foremen and experienced artisans for work requiring especial skill. Foremen or workmen deemed incompetent, disorderly, or insubordinate by the engineer shall upon his written request to the contractor be immediately removed from the work.

The contractor in the construction of the work, shall give preference in employment to the citizens of the aforesaid city and when citizens of said city are not available, shall give preference to citizens of the State of Texas.

*Working Appliances and Progress*:

The contractor is to use such methods and appliances for the performance of the work embraced under this contract as will secure satisfactory results and a rate of progress which, in the opinion of the engineer will secure completion of said work within the time herein specified. If in the opinion of the engineer the methods or appliances used by the contractor are not sufficient to produce the proper character of work or rate of speed, he may order the contractor to increase their efficiency, which order must be conformed to, but the failure of the engineer to demand such increased efficiency, in no way relieves the contractor from his obligation to secure the quality of work or the rate of progress outlined in these specifications.

*Sub-Contracting*:

The contractor shall not assign any of the work, or moneys payable under this contract, nor sub-let the work to be done, or any portion of it without the written consent of the city, provided further that should any sub-contracts be let with the approval of the city they shall be subject to all the terms and provisions of this contract, and shall not in any degree

nor under any circumstances alter the responsibility of the contractor under this contract. The city may at any time revoke authority for sub-contract which may have been previously granted.

*Inspection*:

All materials intended to be used in the execution of this contract shall be subject to the inspection and acceptance or rejection of the engineer or his representative, and all labor necessary in handling such material during such inspection or tests shall be furnished by the contractor, the contractor shall also furnish all necessary testing machines and apparatus that may be required in these specifications.

The engineer, his assistants or inspectors, shall at all times have free access to all parts of the work or places where materials are stored or in progress of manufacture. Defective work or materials may be condemned by the engineer at any time previous to the final acceptance, and notwithstanding that it may have once been inspected and passed by assistants or inspectors. When material has been condemned it shall immediately be removed from the line of work and as soon as possible from the site. Should the contractor fail to do this upon notice, the engineer is empowered to move said material at the expense of the contractor.

Samples of all materials used in the work may be taken by the engineer for tests from each and every shipment, and no material shall be used on the work until permission is given by the engineer to use same.

Work in all cases shall remain at the risk of the contractor until the plans and specifications have been fully complied with, and until the work shall have been finally accepted by the engineer.

The contractor shall give the engineer adequate notice of the place of manufacture or purchase of all materials so they may be inspected before shipment without delay.

*Protection of Finished Work*:

The contractor will be held responsible for all materials or work to the full amount of payments made thereon, and he shall be required to make good at his own expense whatsoever before final acceptance thereof.

The city shall have the right to take possession of and use any completed portion of the work, notwithstanding the time for completing the entire work may not have expired, but such taking possession of and use shall not be deemed an acceptance of the work so taken and used.

*Royalties*:

No allowance will be made for fees for the use of any patented article, appliance, method or material which may be used upon or in any manner connected with the construction or maintenance of any part of the work embraced in this contract. And the contractor hereby agrees to hold the city harmless against any such claims for fees.

*Engineer*:

Whenever the word "Engineer" is used herein, it shall be and is mutually understood to refer to the R. G. Carraway Company, general and consulting engineers, and to their properly authorized agent or agents, limited to the particular duties entrusted to them. The word "City" refers to the city mentioned in contract hereto attached.

The engineer shall have the final decision in all matters or disputes involving the character of the work, or the compensation to be made therefor, or any question arising under this contract, and such decision shall be final and binding on both parties hereto. He shall, as representing the city, have the option of making any change in line, grade, form, position, dimension or materials of the work herein conteemplated, either before or after construction has begun, and all explanation or direction necessary for carrying out and completing satisfactorily the different description of the work will be given by him.

*Extra or Decreased Work*:

All work in addition to that described in the plans and specifications which may become necessary or desirable, the city may require the contractor to do or the city may make separate contract therefor with other parties to whom proper facilities and courtesies shall be extended by the said original contractor. For extra work done by the contractor of the same character as that included in the original contract he shall

be reimbursed according to the state unit prices, and for work of a different character actual cost plus fifteen per cent, to cover superintendence, plant, tools and profit.

Claims for extra work done during any month shall be presented to the engineer at the end of that month for his decision. Claims not so presented shall not be valid. Should it appear desirable to make changes in plans requiring a less amount of work of the contractor than contemplated in the original plans such changes may be ordered in writing by the engineer.

*Responsibilities*:

The contractor will be responsible for all parts of the work including that which has been partially accepted and paid for until the final acceptance of the total completed work, and shall be liable for all losses or damages thereto arising from floods or storms, the nature of the work, accidents, improper use of materials or equipment, or unforeseen difficulties which may be met during the progress of construction or before final acceptance, or from accidents caused directly or indirectly by any of his workmen, and shall protect and save the city harmless against claims for personal injuries or damages to property resulting from the work.

The contractor shall at all times keep the work protected by proper guards in the day time and red lights at night and otherwise observe all city ordi-

nances applying to keeping open passageways, obstructing, tearing up, clearing and cleaning the streets of dirt, stones, or rubbish in hauling.

At all times while the work is in progress the contractor shall keep a superintendent or head-workman upon the site, and also a copy of the plans and specifications. Instructions given to said superintendent or head-workman shall be considered as to have been given to the contractor.

*Abandonment:*

In the event of the contractor abandoning the work to be done under this contract, or if the contract or any of the moneys or orders payable thereunder shall be assigned or sub-let except as herein provided, or if the said work is unreasonably delayed, or if the said work is being done in bad faith and the provisions of this contract are willfully violated, the city reserves the right and option to annul and cancel this contract upon five days written notice to the contractor, and to complete the remaining portion of the work to be done in such manner and by such means as it may deem advisable. Such action shall not entitle the contractor to claim for damages on account of said annulment nor shall it affect the right of the city to recover the damages which may arise from the failure of the contractor to perform his contract.

In case of such annulment all moneys due the said contractor or retained under the provisions herein shall be forfeited to the city, but such forfeitures shall not,

however, release the contractor nor his sureties from the fulfillment of the contract. Said forfeiture shall, however, be credited to said contractor and his sureties toward any greater sum for which they may be liable to the said city. In case of such annulment the city shall have the right and option of taking over all plant equipment and material belonging to the said contractor or under control at the site of the work and to utilize the same for completing the work. In such event the city shall maintain the condition of such equipment as found save for reasonable wear and tear.

*Final Inspection*:

Before the completed work is accepted and paid for in full the contractor shall notify the engineer in writing that it is ready for final inspection and test. Upon receipt of this notification the engineer will arrange to give the work minute and thorough inspection in person. Any defects or omissions noted during the inspection and testing must be made good by the contractor without extra charge before the work will be accepted and paid for in full, tools, appliances and labor for the tests are to be furnished by the contractor.

*Payments*:

The abutting property owners are required to pay three-fourths (¾) of the cost of street improvement, exclusive of street and alley intersections, according to the Front Foot plan or rule; that is, in proportion to the total cost of the improvement as his frontage is

to the total frontage of property abutting on said street, and the city will pay one-fourth (¼) of said total cost of street improvements, plus the street and alley intersections, except the curbs along, around or in front of the property of property owners, which shall be paid for totally by said property owners; the plans indicate the names of said owners to whom the contractor shall look for payment of his certificates.

The city will assess three-eighths (⅜) of the total cost heretofore mentioned, against each of the abutting property owners and their property on the streets so to be improved, and will issue to the contractor assignable certificates evidencing such assessment, and declaring the liability of such owners and their property for the payment of such assessment, which certificate shall recite that one-third (1/3) of the face value thereof is due and payable on demand, one-third (1/3) on or before one (1) year from date thereof, one-third (1/3) on or before two years from date thereof, and that the deferred payments shall bear interest at the rate of eight (8) per cent per annum, and that said property owners shall have the right or option to pay either or both deferred payments, with accrued interest thereon, at any time before maturity. The contractor hereby agrees to accept said certificates in payment for the proportion assessed against said property owners, and to protect and hold the city harmless from the collection thereof, except as herein provided.

The contractor shall ascertain whether or not any of said abutting property is exempt under the law from lien for improvements and also whether or not the owner thereof possesses other property out of which there may be realized a personal judgment against said owner, and a written report of such facts shall be submitted to the mayor. If it should appear that any of such premises are so exempt, and that a personal judgment against the owner thereof could not be realized by execution, and that said owner refuses to satisfactory secure the payment of said certificate of assessment, then the contractor shall not be obliged to lay the proportional part of said pavement and other improvements connected therewith, along, in front or about such premises. If it should appear that any of such premises are not so exempt, or that a personal judgment against such owner can be realized by execution, then in either event, the contractor shall proceed to lay the proportional part of said pavement and improvements connected therewith, along, in front, or about such premises and his contract shall not be considered complete until such pavement is laid.

The city shall exercise all of its charter rights and powers governing assessment proceedings against the owner and said premises, and upon demand of the contractor, shall institute the proper legal proceedings and prosecute same to effect against the owner for the purpose of securing personal judgment against said owner, or said premises, or both, but the city shall not guarantee the collection of any such judgment, nor

shall it become liable for the collection of the same, nor the enforcing of any lien that might be obtained, nor shall the city pay any of the cost of assessment proceedings nor the costs of any court proceedings to obtain a personal judgment against the owner or in affixing a lien upon said premises.

The cost of paving shall be paid as follows, to-wit:

The cost thereof between and under the rails and tracks, and two feet outside thereof and the extra concrete and foundations, ties, etc., thereunder as set forth in these specifications shall, be paid by any railway company or railroad companies that may be occupying any street improved or on, over or across streets that are improved under this contract, on estimates in writing made by the engineer of the city, on the tenth day of each month after the beginning of the work, embracing the work done, material furnished, and material on hand, to the last of the previous month, and since the last estimate, ten per cent of each estimate being held back and reserved by the city or railway company or railroad companies until final completion of the entire street and acceptance by the city.

The city shall pay the cost of improvement of the streets and street and alley intersections except as herein stated that shall be paid by abutting property owners, and railroad companies, provided that in no event shall the city pay for, or be responsible for more than one-fourth (¼) of the total cost of said improvement exclusive of curbs, between the street and said alley intersections, and the total cost of said street and

alley intersections other than the total cost of said curbs along or in front of the abutting property.

The owners of property abutting upon said improvements shall pay the whole cost of installing curbs and three-fourths (¾) of the entire cost of said improvements between the said street and alley intersections. The proportion of said cost payable by said owners shall be paid as hereinbefore set out. Said amounts payable by any owner and the assessment therefor by the city shall be a personal liability against said owner, and a lien against said property according to law

The amount payable by the city for said improvements shall be payable on estimates in writing by the engineer on the first regular meeting of the governing body of said city after the first day of each month after beginning of the work, embracing work done and materials delivered, to the last day of the previous month and since the last estimate, ten per cent (10 per cent) of each estimate being held back and reserved and payable on the completion of the work on the particular street on which estimates are given, and the acceptance by the city.

The city will pay and the contractor shall receive as full compensation for everything furnished and done by the contractor under this contract, and also for all damages arising out of the nature of the work aforesaid, or caused by floods, or difficulty encountered in the prosecution of the work, and for all risks of every description connected with the work, and for all ex-

penses incurred by, or in consequence of, the suspension or discontinuance of the work as herein specified, and for well and faithfully completing the work, and whole thereof, as herein provided, and for making repairs to and maintaining the work in good condition until the final acceptance, the prices stipulated in the proposal hereto attached.

All remedies in this contract shall be taken and construed as cumulative, that is in addition to each and every other remedy herein provided, and the city any and all equitable and legal remedies which it would in any case have.

Before final payment is made, the contractor shall execute and deliver to the city his bond on the form hereto attached, in the sum of twenty-five per cent of the entire cost of said improvement shown by the estimates of the engineer, with some good and sufficient surety company authorized to do business in the State of Texas, and acceptable to the city, conditioned, that the said contractor will well and truly keep such improvements in good repair, reasonable wear and tear excepted of which the mayor and engineer shall be the sole judges for a period of five (5) years from the date of acceptance of the completed work, which bond shall be approved by the city attorney, and governing body of said city.

No person or corporation, other than the signers of the contract as contractor, has any interest hereunder and no claim shall be made or be valid, and neither the city nor any official thereof, shall be liable

for or be held to pay any money except as herein provided. The acceptance by the contractor of the last payment shall operate as and shall be a release to the city and every officer and agent therefor, from all claims and liability to the contractor for anything done or furnished, for or leading to this work, or for any act or neglect of the city, or its officers, agents, or employees, or for any reason relating to or affecting the work.

*Excavation and Haul*:

The contractor shall excavate to the grade and line given by the engineer. No plowing shall be done within two inches of sub-grade. All stakes and their markings shall be maintained by the contractor.

The contractor's bid for excavation includes the hauling of excavated materials a maximum distance of two thousand feet, and the city shall have the right to require the contractor to place said excavated material at any point within city limits, and in case the city requires the contractor to haul said material a greater distance than above stated it shall pay for the hauling of same for each additional one hundred feet per cubic yard the price as stated in the proposal attached hereto. No fill or embankment shall be paid for unless made from actually borrowed material.

*Grading*:

The contractor shall dress all sub-grades to correct grade and contour, including all portions of the street where fill is made. The contractor shall roll with a

ten ton roller such filled portions, until thoroughly compacted. After rolling, grade stakes will be placed by the engineer, and the contractor shall then bring the grade to that indicated by said stakes. Whenever fill is made the contractor shall use the excavated material from other parts of the streets, if same is within the above mentioned free-haul, and he shall not be entitled to claim pay for any part of said fill made from such excavated materials. The contractor shall roll and portions of the sub-grade until the same is compacted to the satisfaction of the engineer. In case "boggy" or soft spots are found in the sub-grade the contractor shall remove said "boggy" or soft spots and replace same with sand, sand and gravel, or other material designated by the engineer which shall be packed or tamped in place to his satisfaction.

*Vitrified Pipe Storm Sewers*:

All storm sewer shall, unless special permission be given to use other materials, be constructed of first class hard burned, salt-glazed vitrified clay sewer pipe of the hub-and-spigot pattern, of standard thickness and dimensions of hubs. The dimension of hub shall be sufficient to leave an annual space for cement of at least 3/8 of an inch thickness for six, eight and ten inch pipe, and 1/2 inch thickness for larger diameters.

Pipe may be furnished in lengths of two, two and one-half or three feet, all pipe and specials shall be sound and well burned and free from broken blisters, lumps, or flakes which are thicker than one-sixteenth

of the nominal thickness of the pipe and whose largest diameter is more than one inch. Pipe and specials having defects greater than the above shall not be used unless in the opinion of the engineer such defects can be placed in the top half of the sewer. Pipe on specials having fire cracks or other cracks extending through their thickness shall be rejected.

Pipe designated to be straight which varies more than one-eighth of an inch from a straight line shall not be used, neither shall there be any variation between any two diameters of a pipe greater than one-twenty-fourth the nominal diameter.

Pipe or specials having broken bells shall not be used, or pipe or specials which show a want of thorough vitrification or fusion, use of improper or insufficient materials, or methods of manufacture, shall be rejected.

All specials, "T," "Y," curves, etc., required shall meet all requirements as above specified, and shall be furnished and set by the contractor without extra charge.

*Drain Tile*:

If in the opinion of the engineer the sub-grade should require draining, the contractor shall lay first class sewer pipe connecting same to the nearest catch-basin or man-hole, in the manner and under the direction of the engineer, which shall be paid for as extra work.

*Trench Excavation*:

The trench shall be excavated exactly to line and grade. The bottom of the trench shall have a clear width at least one foot greater than the external diameter of the body of pipe. The last four inches shall be excavated only a few feet ahead of the pipe laying, by men especially skilled, measuring from an overhead line set parallel to the grade line of the sewer. The bottom of the trench shall be rounded to fit the pipe, and holes shall be dug for the bells so that proper construction of the joints can be had, and so as to give uniform bearing of the pipe.

*Rock in Trench*:

When pipe is to be laid through rock too hard to permit the digging of bell holes, the trench shall be excavated four inches deeper than grade, the trench is to then be refilled with sand or other suitable material, tamped to grade, and the pipe laid thereon. When rock is encountered the engineer shall be notified so that he may measure same before blasting is done. Rock removed which has not been measured by the engineer will not be paid for as rock excavation. Measurement for rock excavation will be limited to six inches on either side of the body of the pipe, and trench slopes shall be eight vertical to one horizontal. In all cases of blasting the blast shall be covered in such a manner as to limit the flying pieces of rock to the trench, and the engineer may limit the number of simultaneous discharges. Local laws governing the

storage, handling and discharge of explosives shall be complied with. No blasting shall be done within twenty feet of the finished sewer, or ten feet of any uncovered gas or water main, provision shall be made to exclude pieces of rock from the finished sewer while blasting is in progress.

No soft, loose, or broken rock, impacted boulder, or hard pan, but only such rock as may require blasting shall be considered as rock excavation, the engineer to be the judge thereof.

*Sheeting*:

Whenever necessary to prevent caving, injury to adjacent pipes or buildings, the contractor shall brace and sheet the trench in such a manner as to overcome the difficulty, at his own proper cost and expense, if it should be decided to leave the bracing and sheeting in the trench permanently by order of the engineer, same shall be cut off one foot below the surface and shall be paid for by the city at the stated price in the proposal hereto attached.

*Refilling*:

In refilling, earth free from stones shall be carefully placed by hand under and around the pipe and two feet above same, and carefully tamped in layers not exceeding six inches in depth, the remaining portion may be done by means of scrapers or other suitable appliances and must be compacted to the satisfaction of the engineer.

*Protection to Buildings*:

The contractor shall take all necessary precaution to protect buildings and other structures from injury on account of his work, and shall be responsible for all damages thereto.

*Pipe Laying*:

In pipe laying each piece shall be laid exactly to grade by measurement from the invert to a tightly stretched line or cord set parallel to the grade line and supported every twenty-five feet. The joints shall be tightly packed and beveled off with the No. 1 mortar herein specified, the cementing of joints must be done two pipe lengths behind the pipe layer. The bell holes must immediately be filled with sand so as to hold the mortar in place. Especial care must be taken to wipe the inside of each joint so that no projection of cement will be left inside the finished sewer.

*Existing Sewers and Water Mains*:

Whenever existing sewers and water mains are encountered in the work, all necessary precaution shall be taken to protect them from injury, but if injury should be done to them, the contractor shall make the proper repairs at his own cost and expense.

In case it should be necessary to change the grade of any sewer, drain or water main encountered, the work of such changing of grade shall be done by the contractor under the direction of the engineer, and paid for by the city as extra work."

Opening of Bids and Action Thereon by City Council as Shown by Minutes.

Plaintiff read from the minutes of the city council of the City of Gainesville showing that the council met at 7:30 P. M. on November 18th, 1919, and opened the bids for the proposed paving, the Southern Construction Co., and the Vaughn & Gardner Co., being the only bidders, and that the bids, after being opened, were laid over until November 19th, 1919, and that the council adjourned to meet at 7:30 P. M. November 19th, 1919, and that the council met in adjourned session on November 19th, 1919, and the minutes of this meeting recite:

"The bids were taken up and discussed at 7:30 P. M. The bidders were asked in separately and made such statements regarding their bids as they wished. After hearing these statements, the council discussed the merits of the respective bids. Alderman Thomas made a motion that the bid of the Southern Construction Company be accepted as presented leaving off the construction bond required and the contracter to put up $5000.00 in collateral satisfactory to the council and pave with brick on the square Dixon street to Broadway, Commerce street to Scott street, material to be left open, Dixon street to M. K. & T. R. R., material to be left open and the mayor and secretary be authorized to make the contract with the Southern Construction Company. A yea and nay vote was taken and resulted in eight yeas and no nays".

Ordinance Confirming Contract Between the City of Gainesville and the Southern Construction Company.

Plaintiff read in evidence an ordinance of the city council entitled, "An ordinance confirming contract between the City of Gainesville and the Southern Construction Company, A co-partnership, contractor, for the furnishing of the necessary materials, machinery and labor for constructing certain street improvements in and for the City of Gainesville, Texas in accordance with proposal of contractor and plans signed by both parties thereto and made a part thereof; providing for the issuance of City of Gainesville Street Improvements warrants as evidence of the city's debt therefor; providing for the levying of a tax to pay the interest and sinking fund for its redemption at maturity; and declaring an emergency."

Approved the 16th day of December, 1919.

Which ordinance is attached as an exhibit to plaintiff's third amended original petition and is hereby referred to and made a part of this bill of exceptions, the same as if copied herein.

Ordinance of City Council Ordering an Election Concerning State Paving Law.

Plaintiff introduced an ordinance of its council dated September 16, 1919, ordering the question of the adoption of chapter 11, title 22 of the revised statutes, known as the state paving law, to be submitted to the qualified tax-paying voters of the city, at an election to be held for that purpose on October 21, 1919, and the

minutes of November 4, 1919, showing that the returns of this election were canvassed and that a majority of 322 were in favor of such adoption and an order of the same date declaring the result of the election and the adoption of said title and chapter.

The minutes recite that the city attorney read the ordinance and contain a copy of it, but in reference to the passage of said ordinance, the minutes are as follows:

"Alderman Robbins made a motion that the ordinance be placed upon its second reading by caption. Motion carried.

"Alderman Robbins made a motion that the ordinance be placed upon its second reading by caption. Motion carried.

"Alderman Robbins then made a motion that the ordinance be adopted. A yea and nay vote was taken which resulted as follows: Yeas, 10. Nays, none. Thereupon, the mayor declared the ordinance duly adopted."

Resolutions of City Council Concerning Auditing and Allowing Estimate for Material Furnished and for Work Performed.

Plaintiff introduced a resolution of its council of October 5th, 1920, as follows:

Auditing and allowing estimate of the Southern Construction Company, for materials furnished and

work performed in the construction of street improvements in and for the City of Gainesville, Texas.

City Hall, City of Gainesville, Texas.

October 5th, 1920.

The city council of the City of Gainesville, Texas, met in regular session in the city hall in said city on this the 5th day of October, 1920, at which meeting the mayor, city secretary and the following members of the board of aldermen were present to-wit:

Present: Geo. A. Beck, R. L. Kendall, C. M. Buckingham, J. E. Bramble, S. F. Robbins, A. M. Bell, W. B. Nowell, and Lee Lewis;

when the following proceedings, among others, were had, to-wit: The mayor offered for consideration and passage a resolution providing for the allowance of the estimate and claim of the Southern Construction Company, Contractor, for materials furnished and work performed in the construction of certain street improvements in and for the City of Gainesville, under its contract with the said Southern Construction Company of date November 20, 1919.

Moved by Alderman Buckingham and seconded by Alderman Kendall that the resolution, including claim of contractor, be read in full.

Motion carried, and the resolution and claim were read in full by the city secretary.

Moved by Alderman Buckingham and seconded by Alderman Kendall that said resolution be adopted.

Ayes: Buckingham, Kendall, Beck, Bell, Bramble, Robbins, Nowell and Lewis.

Nays: None.

The Resolution Follows:

Whereas, on the 20th day of November, A. D. 1919, the City of Gainesville entered into a contract with the Southern Construction Company, Contractor, for the construction of certain street improvements in and for the City of Gainesville; and

Whereas, on the 6th day of April, 1920, there was presented to this council, an estimate and claim of the said Southern Construction Company, said claim being for estimate No. 1 under said contract, in the amount of $3000.00, which claim was duly approved and allowed, and warrants numbered one (1) to three (3) inclusive, in the denomination of $1000.00, aggregating $3000.00, were delivered to the said Southern Construction Company, Contractor; and

Whereas, on the 21st day of September, 1920, there was presented to this council, an estimate and claim of the said Southern Construction Company, said claim being for estimate No. 2 under said contract, in the amount of $10000.00, which claim was duly approved and allowed, and warrants numbered forty-one (41) to fifty (50) inclusive, in the denomination of $1000.00, aggregating $10000.00, were delivered to the said Southern Construction Company, Contractor; and,

Whereas, the said Southern Construction Company, has furnished additional materials and performed ad-

ditional labor under said contract and in accordance with the plans and specifications attached thereto and made a part thereof, and for said additional materials and work, the said Southern Construction Company has presented to this council this third estimate and claim, which claim and estimate is in words and figures as follows, to-wit:

Estimate Number Three.

To the city council of the City of Gainesville, Texas.

Gentlemen:

We present to you below estimate No. 3, being claim for additional materials furnished and additional work performed under contract with the City of Gainesville, Texas, dated November 20th, 1919, for partial costs of the construction of street improvements provided for in said contract, to-wit:

$17000.00, materials furnished and work performed.

Respectfully submitted,
Southern Construction Company.
By Lester Levy.

And, whereas, the materials so furnished and the work performed and covered by said claim, has been by this council inspected and accepted by it, to be in accordance with said contract and the plans and specifications adopted by this council, and it has been determined by this council that said materials and work are well

worth the price as agreed to be paid therefor as reflected in said claim and estimate; and,

Whereas, said claim has been duly audited and found to be correct.

Therefore, be it resolved by the city council of the City of Gainesville, Texas, that the claim of the said Southern Construction Company covering the additional materials furnished and labor performed in the construction of said street improvements, aggregating the sum of $17000.00 be and the same is hereby approved and allowed.

That in accordance with the terms and provisions of said contract, and the claim of the said Southern Construction Company presented to this council, there shall be delivered to said Southern Construction Company, City of Gainesville Street Improvement Warrants, Series A-1, to the amount of $17000.00, being warrants Nos. 34 to 40 inclusive, in the denomination of $1000.00 each, dated Nov. 20, 1919, bearing interest at the rate of 6% per annum, authorized to be issued by an ordinance duly passed by the city council of the said city on the 16th day of December, 1919, and recorded in Book 6 at pages 570, *et seq.*, of the minutes of this council, evidencing the indebtedness due by said city to the said Southern Construction Company, its assigns or bearer.

That the City of Gainesville has received full value and consideration for the warrants herein authorized to be delivered.

Passed, this the 5th day of October, A. D. 1920.

Approved, this the 5th day of October, A. D. 1920.

(Signed) E. N. Blackburn,
Mayor, City of Gainesville, Texas.

Attest:

S. A. Bryan,
Secretary, City of Gainesville, Tex."

Said resolution was a typewritten carbon copy in which blanks had been left and the blanks filled in with a pen, the blanks so filled in being: "regular" before "session," "5th" before "day of October," the names of the aldermen, and the name of the aldermen making and seconding the motion, "17000.00 material furnished and work performed," "Later Levy" after "by," "$17000.00," "A-1," "Nos. 24 to 40."

In this connection, plaintiff offered in evidence, the resolution of its council of September 21st, 1920, providing for the issuance of warrants 41 to 50 inclusive, which was also a typewritten carbon copy with blanks left and filled in with a pen as in the resolution of October 5th, 1920, but the name of H. D. Levy appeared instead of Lester Levy, and the blank filled in concerning what had been done was as follows:

"Materials furnished and labor performed on Dixon, Commerce, Main and California streets $10000.00."

In this connection, plaintiff introduced a resolution of the council, dated November 2nd, 1920, which was in like manner a typewritten carbon copy with blanks left and filled in with a pen in like manner as the two preceding resolutions, Lester Levy's name being inserted in one of the blanks and the filled-in blank in reference to what had been done was as follows:

"Work performed and materials furnished, $10000.00."

This resolution directed the issuance of warrants 14 to 23 inclusive. To this was attached a blank typewritten form for the certificate of the secretary, and a blank affidavit to be signed by the mayor and aldermen, and a blank for a certificate in reference to the signature of the mayor, secretary, etc. All of the resolutions for the issuance of warrants had similar blanks for the affidavit of aldermen and the like.

In this connection, the plaintiff introduced a resolution of its council of November 16th, 1920, providing for the issuance of warrants Nos. 4 to 13 inclusive, which was also a typewritten carbon copy with blanks left and filled in with a pen in a similar manner to the others, and also containing typewritten blanks for the affidavits of the aldermen, certificate and the like.

There was a previous resolution of April 6, 1920, directing the issuance of warrants 1, 2 and 3 for $1000.00 each, which warrants have been paid and were issued for paving done and accepted, and are omitted as immaterial.

The warrants were in the form as set forth in the third paragraph of plaintiff's third amended original petition, and the transfer upon each warrant from the Southern Construction Co. with the exceptions above stated the last named four resolutions were in form and substance the same as the resolution of October 5th, 1920, to bearer was as set forth in said third paragraph.

Motions of Aldermen Thomas and Barrett, Concerning Paving as Shown by Minutes of Journal of the City Council.

The minutes or journal of the council contain the following:

September 16th, 1919.

"Alderman Thomas made a motion that the city engineer prepare plans and specifications and advertise for bids for paving the court house square and Commerce street from California street to Scott street with brick. Motion carried" (Book 6, page 524).

"On motion of Alderman Thomas, the council agreed to pave the intersections on any street that Mr. Levy, the paving contractor can sign up the property owners on, and the council gave him an option on Lindsay street and East and West California street" (Book 6, page 524).

September 16th, 1919.

"On motion of Alderman Barrett, the contract with Mr. R. G. Carraway, paving engineer, was ordered signed by the mayor and secretary when same was approved by the city attorney" (Book 6, page 528).

This, and the foregoing paragraphs of this bill, contain all that appears on the minutes of the council concerning the paving in question prior to the opening of the bids.

*F. M. Savage—Direct Examination.*

MR. F. M. SAVAGE, witness for the plaintiff, testified:

My name is F. M. Savage. I reside in Gainesville, Texas. I have been secretary of the City of Gainesville for five years. I have the paving contract between the City of Gainesville and the Southern Construction Co. I do not think there are any specifications on file except what is contained in the contract. I have never been able to find the instructions to bidders and the specifications except as contained in the contract.

(This instrument has already been copied in this bill). There was a bond for $5000.00 I believe, given by Mr. Head and Mr. Potter. I was not secretary at the time that bond was given. I was not secretary in October, November and December, 1920, when the resolutions for the issuance of the warrants were passed. I become secretary on the 20th of January, 1921. At that time, there had been some tarvia paving done on Dixon and perhaps on Davis street. The Southern Construction Co. did quite a lot of brick paving after that. The brick paving was on the public square and on that part of Dixon street from the square to Gorham, and on Commerce street from the square to Scott. That brick paving was started after I became secretary and afterwards accepted but I can't say just when. The acceptance on

Dixon street is dated May 17th, 1921. The first brick paving I think was done on the east side of the public square. At the time the resolutions were passed, none of the brick paving had been done. The records show that the city had paid freight on one car of brick. The first car of brick was received October 21st, 1920. The second car on January 11th, 1921. There were three cars received at once and then they came in pretty rapidly—on the 15th one, on the 18th one, on the 19th, 26th and 27th. The city was paying the freight on these. Some of the brick come from Thurberville and some from Coffeyville, Kansas. I don't think my records show which one. There is no estimate by the engineer on file in reference to the $17000.00 worth of material furnished and work performed mentioned in the resolution of October 5th, 1920. The resolution of November 2nd, 1920, says, "Work performed and material furnished, $10000.00." There is no engineer's estimate on file. I know nothing except that the resolution says. The resolution of November 16th, 1920, says, "Work performed and material furnished, $10000.00." No engineer's estimate is on file and there is nothing except what the resolution recites. I have never found any estimates by the engineer except what is recited in the resolutions. There were $50000.00 of paving warrants issued to the Southern Construction Co. in all and $44000.00 of them are still outstanding, $6000.00 having been paid. Warrants 1 and 2 maturing on March 1st, 1921, were paid; warrants 3 and 4 maturing on March 1st, 1922, were

paid; and warrants 5 and 6 maturing March 1st, 1923, were paid, and all the coupons maturing on the entire series up to that date were paid. The brick paving was done in 1921. I have never issued to Brown-Crummer Co. or the Southern Construction Co. a check for paving since I have been in office. The estimates made since I have been in were made in order to reach the cost that was due from the property owners. Just as soon as one of these estimates was made, Mr. Levy would come in and demand his certificate. That is what these estimates were made for that I spoke of and the only ones I have. I have an estimate submitted on March 1st, 1921, and reads like this: "Cost to property for engineering work done as to date March 1, 1921, Southern Construction Company, contractor, Dixon street from Broadway to Gorham, total cost to property, $5012.85; the Square on the east and south sides; total cost to property, $6108.58; total cost to property, $11121.23. Total cost to property not including engineering, $10591.63. Cost to property for engineering, $529.60; cost to property for engineering on tarvia portion of North Dixon street, $570.41; total cost of property of engineering, $1100.01." No warrants were issued to the Southern Construction Co. for paving that was done while I was secretary. The tarvia paving was paid for before I went into office, and I had nothing to do with that. The public square was paved with brick after I went into office and Dixon street from the square to Gorham and Commerce street from the square to Scott, in fact, all the brick paving was done while I was

secretary. Since I have been secretary, no warrants were issued to the Southern Construction Co. They had already been paid in advance.

*W. P. Springfield, Direct Examination.*

W. P. SPRINGFIELD, for the plaintiff, testified:

My name is W. P. Springfield. I have been street commissioner for the City of Gainesville for the past fourteen years. I remember Harry Levy and Lester Levy, who claimed to be the Southern Construction Co. In 1920, they did some paving on North Dixon street from Gorham street to Haight street, and a little on Davis street. It was tarvia paving on North Dixon street. It was also tarvia on Davis street, except they used liquid asphalt instead of tarvia. They did no brick paving in 1920. I think they broke dirt for brick paving in December, 1920, or some time along about the middle of the month on the northwest corner of the square. They finished the brick paving in 1921. Up to January 1st, 1921, there had been a little excavation done on the north side of the square. There wasn't any brick work done at all. There hadn't been any brick laid. If the Southern Construction Co. had any cement on hand in 1920, I didn't know anything about it. I was looking after paving a part of the time. They had no brick on hand in 1920, that I know anything about. I think the brick came in the first part of 1921. The brick come from three different places, some from Thurberville, some from Coffeyville, Kansas, and some from another

place, I don't know where—I think from Oklahoma. These bricks were all shipped in 1921.

*A. M. Bell, Direct Examination.*

A. M. BELL, for the plaintiff, testified:

My name is A. M. Bell. I am a member of the city council for Gainesville, Texas. I was elected in April, 1919, but I was out of the council two years. I was out in 1922 and 1923. The entire paving done by the Southern Construction Co. amounted to approximately between thirty-four and thirty-five thousand dollars. The brick paving was done in 1921 after the warrants had been issued to the Southern Construction Co.

*A. M. Bell, Cross Examined by Mr. Weisberg.*

The paving done by the Southern Construction Co. amounted to much more than thirty-five thousand dollars including the portion assessed against the lot owners. The city's portion would be about one-third including intersections.

*A. M. Bell, Re-Direct Examination by Mr. Davis.*

The blocks in Gainesville are generally two hundred feet in length—supposed to be. Of course, I never measured them, but that is what they are considered. The streets are sixty feet around the court house. We haven't got but one sixty foot street in Gainesville, and that is Broadway.

*W. L. Blanton, Direct Examination.*

W. L. BLANTON, for the plaintiff testified:

I was appointed city attorney of Gainesville on March 16th, 1921. At that time, they were just commencing to lay brick paving on the square. At that time, I don't think they laid any brick on Commerce street or on Dixon street. My office is on the west side of the square. Brick paving commenced in March, 1921, and was completed later in the year. The only paving done in 1920 was some tarvia on Dixon street north of the square and on Davis street which is in the south part of town. I don't know of any other paving that was done in 1920. I own some property on Davis street and I know that they put paving on that street. That was in 1920. The city's part of the paving done by the Southern Construction Co. amounted to something like thirty-four thousand six hundred and some odd dollars. The exact amount is stated in the petition. The engineer made a complete estimate. An engineer named Creiger was appointed by Mr. Head and Johnson Williams, the engineer for the City of Gainesville made a complete estimate of all the work done under this contract. That was the city's part of all the paving done by the Southern Construction Co. under the contract. The blocks around the public square are 200 feet square. All the old part of the town which was platted on forty acres of land, was laid out two hundred feet, and the streets are sixty feet. After that the new additions come in and they changed the number of lots in the blocks and also the streets are different widths. The new additions are irregular.

*W. L. Blanton, Cross Examination by Mr. Heed.*

The property owners were to pay three-fourths and the city one-fourth and that was to be approximately the difference. You would figure it out that way. The estimates against the property owners were evidenced by issuing a paving certificate by the city council. Against each owner, the engineer would make an estimate, what part of it and how much that property owner would owe, and the city would issue a certificate against it in favor of the construction company.

*W. L. Blanton, Re-Direct Examination.*

The city paved the intersections to the curb on each side. The streets between the curb are sixty feet throughout. Some of the sidewalks are ten feet and some of them are eight. The sidewalk reduces the paved part of the street to about forty feet. The city would pave sixty feet each way at the intersections.

*W. L. Blanton, Cross Examination by Mr. Suggs.*

The brick paving comprehended the square around the court house, and two streets extending from the square. That paving was done under Chapter 11, Title 22. The city did not adopt that until the last year I think. I wasn't in office when the street paving law was adopted. I was appointed city attorney March 16th, 1921, and the brick paving begun about that time. As soon as one block was completed, the engineer would make an estimate, and then they would issue those certificates against the property owners. I don't remember just when the Southern Construction Co. quit work.

Mr. Harry Levy notified—that is, he said in the council meeting that he was moving out—wasn't going to do any more work. I think that occurred sometime probably in October or November, 1921. I do not think any paving certificates were issued against the property owners after that. There was none issued that I know of. I think all certificates had been issued. I think these matters are of record in the minutes. About that time, the city attorney was ordered to make an investigation and to file suit.

*W. L. Blanton, Cross Examination by Mr. Weisberg.*

The attorney for the Construction Co. looked after the issuance of the certificates. I had nothing to do with it.

*W. L. Blanton, Re-Cross Examination by Mr. Suggs.*

I think Mr. Levy drew those paving certificates. That is just my opinion about it. I was representing the city. I didn't represent the paper holders.

*W. L. Blanton, Second Re-Direct Examination by Mr. Davis.*

It is my recollection that Harry Levy was before the council and stated he was going to move out. They did move out—moved all their machinery and never came back, and did no more paving after brick was laid on Dixon and Commerce streets and around the square.

*W. L. Blanton, Re-Cross Examination by Mr. Weisburg.*

The resolution of the council is, I think, dated September 21st, 1921, and that is when they closed up the matter and instructed the city attorney to file suit

to get this matter settled. They were moving out then. The injunction Judge Davis got out was for East California and Lindsay streets. That was only a part of the job. The big part was on the square. The work enjoined was a substantial part of the job. The big work was not on the streets covered by the injunction. East California and South Lindsay, I don't think, were to be brick. They hadn't determined whether it was to be brick or what material was to be put on it. It is my recollection that these streets were included in the contract. East California and Lindsay were not about all that remained to be done on the job. They could still go further up after the brick work was completed. The brick work was to go a certain distance, and after that, it was to be a different material and the same on Dixon. I don't know what proportion of the work these streets represented. The Levys didn't say they quit because of the injunction, but the work did stop after that. I don't remember whether the injunction was made perpetual. After the work was stopped, I paid no more attention to the injunction. My impression is that all these paving certificates issued against the property owners have been paid. I don't know about that. I didn't say positive whether they have or not.

*W. L. Blanton, Second Re-Cross Examination by Mr. Suggs.*

The streets upon which the paving was enjoined were subsequently paved. East California street was paved last year just recently. None of them were paved in a matter of months or less than a year after the in-

junction was issued. South Lindsay street was paved by the city. It was done I don't know how long after the injunction suit—a good long time though. I guess South Lindsay was paved in 1922. East California was paved last year.

*W. L. Blanton, Re-Cross Examination by Mr. Head.*

It was just my impression that the property owners paid the certificate issue against them. I didn't state positive whether they have been paid or not. I just got the impression most of them had paid.

*W. L. Blanton, Third Re-Direct Examination by Mr. Davis.*

The figures made by Bud Williams and Mr. Kreiger make the city's part of the entire paving $34,736.29. The correct amount was stated in the petition. This is the estimate made by the engineer and agreed to by Mr. Hayden Head and agreed to by the Levys. I don't know what California street was to be paved with. I don't remember upon what grounds the injunction was granted. The injunction was made perpetual and it was also made perpetual on South Lindsay street. It was in September when the resolution was introduced to make a settlement with the Levys; after that, Mr. Hayden Head came over there and the Levys and the council agreed with them that they could go ahead, and I think there was some agreement about Lindsay street, and if Mr. Head had lived I think he would have finished it and paved Lindsay street. He was talking about doing it. The city was willing to let them go anywhere, provided

they would do that $50,000.00 of paving. No agreement was made. They offered to do it but I don't know why the agreement wasn't carried out.

*W. P. Springfield, Recalled by Plaintiff.*

W. P. SPRINGFIELD, recalled by the plaintiff, testified:

I was present when the council of Gainesville passed the resolutions for the issuance of the paving warrants for the Southern Construction Co. The Levys were there and so was Mr. Blaine. I don't know Mr. Blaine's initials. Mr. Blaine did not live in Gainesville, and did not own any property there that I know of. Mr. Blaine was going to sell the warrants or was going to take them. He had something to do with that part of it, that is all I know. E. N. Blackburn was mayor at that time and was sick. When the council would adjourn after passing the resolution, Mr. Levy and Mr. Blain asked me to go over to Mr. Blackburn's house. They claimed that they would forget the street and how to get there, and I went over with them three or four times after the council would adjourn to get the mayor to sign the papers.

*C. M. Buckingham, Direct Examination.*

C. M. BUCKINGHAM, for the plaintiff, testified:

I was a member of the city council of Gainesville in 1920 and 21. I remember that there were about four resolutions passed in the fall of 1920 for the issuance of warrants to the Southern Construction Co. To the best

of my recollection, Mr. Blain was always right there in the council meeting, when the resolutions were passed. I suppose Mr. Blaine prepared the resolutions. I was not present when he prepared them, but he was there with them. I saw these resolutions in Mr. Blaine's hand. That is all I know. Mr. Blaine did not live in Gainesville, but was on hand when the resolutions were being passed. The paving had not been done as recited in the resolution. The public square was paved with brick in the early part of 1921. Commerce street was paved the same year, but later on. Dixon street was paved with brick the same year. At the time these resolutions were passed, the members of the council knew the work had not been done.

*C. M. Buckingham, Cross Examination by Mr. Weisbert.*

I was on the council at that time.

(Here, Mr. Weisberg showed to the witness the resolutions for the issuance of the warrants and the affidavits thereto attached signed by the mayor and each of the aldermen and the witness admitted that his signature to the affidavits as well as that of the mayor and other aldermen were genuine.)

*C. M. Buckingham, Re-Direct Examination by Mr. Davis.*

I don't know who prepared these resolutions. I don't know whether Mr. Blaine did or not. I don't remember at whose request I signed. I signed them as an alderman. I don't know what the resolutions con-

tain. I don't know what those things are, but whatever I signed was the adoption of the council and I signed as a member of the council.

Mr. Davis: One of these is a certificate made on the 24th day of April, 1920; of course, that has nothing to do with this deal. Take this resolution of the 5th day of October, 1920—that paper there.

A. Estimate No. 3. I don't know who prepared it. I don't know at whose request I signed it. I don't remember anything about it.

*C. M. Buckingham, Cross Examination by Mr. Suggs.*

If I remember correctly, it was Mr. Blaine who produced the resolution before the council. To the best of my recollection, the city attorney didn't fix it up. To the best of my recollection, the first time I saw those resolutions was when Mr. Blaine, whoever he was, appeared before the council and produced them before the council.

*C. M. Buckingham, Re-Cross Examination by Mr. Weisberg.*

Q. Mr. Buckingham, isn't it a fact that you and the council, whatever you signed, you signed it on the advice of your city attorney? A. Always, yes.

I don't remember what the resolution is. At the time I was familiar with it and now I am not. I have forgotten all about that. I have been out of the council four years, but at the time I was familiar with it, and whatever I signed, I thought it was all right. I am sure it was. I don't remember what warrants were issued.

*C. M. Buckingham, 2nd Re-Direct Examination by Mr. Davis.*

Oh, at that time, everything was read to us. We were familiar with what we were signing at that time. I don't remember what it was. The paving wasn't done until 1921. On October 5th, 1920, if there was any paving done at all, it couldn't have been anything more than just an excavation or something like that. There wasn't any paving until 1921.

By the Court: What I am trying to get at is what estimate of material is covered by this? A. I don't know, Judge; I don't know what that is.

Q. But you do say that whatever that relates to had been done? A. Evidently, yes, sir. We signed it.

By Mr. Davis:

At that time, I don't think I had seen or inspected any material. Let me see. The dates are confused in my mind. That says October 5th, 1920. I don't know.

*C. M. Buckingham, 2nd Re-Cross Examination by Mr. Wiseberg.*

Q. There was a time when there was considerable material on the ground, and it was later moved, wasn't it? A. Oh, that was later, on yes, sir.

(The plaintiff here rested.)

**Defendants' Evidence.**

Original Petition Introduced by Defendant, Head.

Defendant Head, over the objection of the plaintiff that it was immaterial and irrelevant, introduced the original petition filed in this cause and the judgment

rendered thereon and the appeal bond and the opinion of the court of civil appeals reversing and remanding the case as showing an election on the part of the City of Gainesville to hold the Southern Construction Co. for damages and thereby treat the warrants belonging to the Southern Construction Co. and not the City of Gainesville. To this, the plaintiff excepted and took this its bill.

The original petition was filed in the District Court of Cooke County, Texas on October 11, 1921, against H. W. Head, the Southern Surety Co. and Harry D Levy and Lester Levy, partners under the name of Southern Construction Co. The petition declared upon the two obligations executed by the defendant Head to the city, dated respectively on September 10th, 1920, and October 4th, 1920, the same as is contained in the third amended original petition and the obligation of the Southern Construction Co., and sought to recover of all the defendants the sum of $15000.00 as the difference between the paving done and the $50000.00 of warrants that had been issued, and sought to recover of the Southern Construction Co. for delay and extra expense of engineer, and to water furnished and other similar things. A default judgment was rendered on November 4th, 1921, in favor of the plaintiff against all the defendants for $15000.00, and against the Southern Construction Co. for $4090.00. The Southern Construction Co. and H. W. Head appealed from this judgment to the court of civil appeals,

executed an appeal bond in the sum of $500.00. This judgment was reversed as to H. W. Head and the Southern Surety Co. by the court of civil appeals as shown in *Head* v. *City of Gainesville,* 254 S. W. 323, but left undisturbed as to the Southern Construction Co., and the usual mandate was issued to the lower court accompanied by a certified copy of the opinion.

Certified Copy of Ordinance of December 16, 1919, Introduced by Brown-Crummer Investment Co.

The defendant, Brown-Crummer Investment Co. introduced a certified copy of the ordinance of December 16th, 1919, Book 6, page 574, authorizing the issuance of the warrants, in question, a true copy of which is attached to plaintiff's third amended original petition as Exhibit A and hereby referred to and made a part of this bill.

Resolution Providing for Issuance of Paving Warrants Offered by Brown-Crummer Investment Co.

Defendant Brown-Crummer Investment Co. next offered a resolution of April 16th, 1920, providing for the issuance of paving warrants 1, 2 and 3, recorded in Book 7, page 28, of the minutes of the City of Gainesville, and the affidavits thereto attached, but the resolution and affidavits are omitted as immaterial as these warrants have been paid and no question is made in reference thereto.

18.

The defendant, Brown-Crummer Investment Co. next offered a copy of the resolution of September

21st, 1920, directing the issuance of $10000.00 of paving warrants and the affidavits and certificates thereto attached, the contents of which are fully stated in this bill.

19.

The defendant, Brown-Crummer Investment Co. next introduced a certified copy of the resolution of October 5th, 1920, providing for the issuance of $17000.00 of paving warrants, and the certificates and affidavits thereto attached, the contents of which are more fully stated elsewhere in this bill.

20.

Defendant, Brown-Crummer Investment Co. next introduced a certified copy of the resolution of November 2nd, 1920, directing the issuance of $10000.00 of paving warrants and the affidavits thereto attached, the contents of which are fully stated in other parts of this bill.

21.

The defendant, Brown-Crummer Co. next introduced a certified copy of the resolution of November 16th, 1920, directing the issuance of $10000.00 of paving warrants and the affidavits and certificates thereto attached, the contents of all of which are elsewhere fully stated in this bill.

*R. E. Crummer, Direct Examination.*

R. E. CRUMMER, witness for the defendant, testified:

My name is R. E. Crummer. I live in Wichita, Kansas. I am vice president of the Brown-Crummer

Company, and was vice president in 1919, 1920 and 1921. I am the active head of the company. I approved the contract for the purchase of the warrants involved in this case. The transaction was handled under my supervision. The Brown-Crummer Investment Co. had an employee named J. E. Blaine. His duties principally were to report pending municipal issues of warrants and bonds throughout the state of Texas, and when an issue was submitted and met our approval, on specific authority, he could negotiate for our account. He did not have authority to close any contract without specific authority. I believe his employment ceased in the fall of 1920, probably September or October. I would guess September 1st. Judge W. M. Harris of Dallas was passing on this transaction for the Brown-Crummer Investment Co.

(Mr. Weisberg here handed the witness some papers and continuing, the witness said:)

This is a draft for $2850.00 covering the first $3000.00 installment of warrants, as presented, our check in payment of them, the approving opinion of Judge Harris, and the final delivery papers, including the approval of estimate by the city of that $3000.00 installment. The draft was drawn by H. W. Head on Brown-Crummer Investment Co. The other papers, certificates and affidavits were attached.

This other paper is a draft for $9500.00, drawn by H. W. Head on the Brown-Crummer Company, dated September 22nd, 1920, our cancelled check for $9500.00, dated September 27th, 1920, issued in payment of the

draft, Judge Harris' approving opinion covering the $10000.00 of warrants that were attached to the draft, and also the final delivery papers executed by the city, approving that $1000.00 installment of warrants. They were all attached together when the draft arrived in Wichita, Kansas, and the draft was presented and paid.

This is a draft for $16,150.00 drawn by H. W. Head on Brown-Crummer Company, our canceled check dated October 19, 1920, for $16,150.00, issued in payment of the draft, the approving opinion of Judge Harris covering the $17000.00 of warrants that were attached, together with the final delivery papers and approved estimate by the city officials relating to that installment of $17,000.00 of warrants, all of which were presented and paid. They were all attached, including the warrants, at the time they arrived in Wichita, Kansas.

This is a draft dated November 5, 1920, for $9500.00, drawn by H. W. Head on the Brown-Crummer Company, our check for $9500.00 canceled check, dated November 30, 1920, in payment of the draft, Judge Harris' approving opinion covering the $10000.00 of warrants that were attached, together with the final delivery papers, the approval of $10000.00 estimate by the city officials, all of which were presented at the time the draft was paid. All the papers were attached to the draft. The estimates and opinion would come directly from Judge Harris, but they were all attached finally when the draft was paid. The date of the above draft was November 5, 1920. This is our can-

celed check dated January 1st, 1921, for $9500.00, issued in payment of the final installment of the $10000.00 of warrants approved by Judge Harris' opinion, together with the final delivery papers executed by the city, which were presented with the last $10000.00 of warrants that were paid for. I seem to have misplaced the draft. It is the draft, I am quite positive, drawn by Mr. Head, as usual, but that draft has been misplaced. The check with which that was paid was attached to it and it is dated January 1st, 1921.

In case of each of these five drafts, I examined the papers attached at the time they reached Wichita, Kansas, and before actually paying the draft. I believed the recitations contained in the papers to be true and relied upon them. If I had known of any infirmities in any of these warrants, I would not have paid them. I have the warrants and coupons which are now owned by the Brown-Crummer Investment Co.

(Here, it was admitted that the past due warrants and coupons were as stated in Exhibit A to the pleadings of the Brown-Crummer Investment Co.)

The certified copies of the resolutions of September 21st, October 5th, November 2nd, and November 16th, produced by the witness Crummer, were certified to by S. A. Bryan, city secretary. These were typewritten with the exception of the blanks filled in with a pen. They are the originals of the carbon copies that were left with the council, and used by them. These resolutions were approved by the mayor upon

the day of their passage and were certified to by the city secretary on the same day, and to each were attached the affidavits made on the same day by the mayor, alderman and city secretary before a notary public, and the certificate dated upon the same day in reference to the signatures of the mayor, secretary and treasurer. In other words, everything in the matter of certificates, affidavits and the like bear the same date as the passage of the resolution. These resolutions and attached affidavits and certificates, are sufficiently described in the 7th paragraph of this bill. The affidavits of the mayor, secretary and aldermen said that the statements contained in the resolutions were true and correct, and that the materials so furnished and the work so performed and covered by the estimate or claim had been by the council inspected and accepted and found to be in accordance with the contract and plans and specifications, and had been determined by said council to be well worth the price agreed to be paid therefor as reflected in said statement of account or estimate, and that the City of Gainesville had received full value for the money represented by said warrants. To each of these transcripts was attached the certificate of W. M. Harris saying that he had examined the copy of the proceedings and the warrants and that in his opinion such proceedings show lawful authority and that he found the warrants to have been properly executed and that in his opinion the warrants were valid and legally binding upon the City of Gainesville.

*R. E. Crummer, Cross Examination by Mr. Davis.*

Mr. Blaine's initials are J. E. I have seen him since I have been here in Sherman. I think he is here now, probably in the court house. He was once connected with the Brown Crummer Company. His duties were to report on pending bond issues; to investigate and report for me on pending bond issues, also all municipal issues. My recollection is we were paying him $200 or $250 a month. I never paid him a commission according to my recollection. He had no other business except to represent us that I knew of while he was in my employ. I would estimate he was in our employ for a year. He negotiated for me the contract to purchase these warrants. Well, I wouldn't say that he looked after the warrants for me until the transaction was closed—not entirely so. I would say Judge Harris looked after the transaction until it was completed. Blaine got no commission from us that I know of. We paid ninety-five cents on the dollar for the warrants, and Blaine was entitled to no part of that discount. I expected that Mr. Blaine's assistance at any time he could render it, if asked, but the detail of this transaction, I think, was handled largely by Judge Harris at this end and myself in Wichita. Oh, yes, Blaine was the man that made the original contract. I don't know anything about Blaine being on hand looking after the city's business. Well, I think that he was familiar with the terms of the contract and the final delivery papers that were submitted. I had a copy of them. I had the contract with the warrants, you

understand, not the original contract for the improvement. I didn't know what was in the contract between the city and the construction company. I didn't know the details of the contract. I can't say that the expression, "Work performed and material furnished," struck me as somewhat peculiar. I presume the city officials prepared the resolution.

Q. Well, were you so suspicious that in addition to the certificate of the secretary that it was a true copy of the resolution, that you got the affidavits of the various aldermen? Why did you do that? A. We try to deal with these municipalities in an honorable, decent way, so that there will be no future controversies over it. We try to take every reasonable, ordinary safeguard that we can to satisfy ourselves that these obligations are issued for value and in good faith. Relying upon our attorney's advice, and these papers, I assumed that the city did have authority to issue the warrants without the engineer having made an estimate and certifying to it. I didn't know of Mr. Head's connection with this transaction until these warrants began to come through his bank with his signature attached to the draft. That did not strike me at all as peculiar. It didn't indicate that some string was tied to the warrants. That is very ordinary. It is ordinary for warrants to be issued in advance of the work done. Many times, warrants are issued and escrowed exactly as they were in this instance.

Q. What do you mean by escrowed? A. Delivered to either the depository of the city or to some mutually agreeable bank, and released as the estimates therefore are allowed by the city from time to time.

I would guess that Mr. Blaine was in my employ for six months to a year. I do not know who prepared these resolutions. I supposed the city prepared them or Judge Harris, our legal adviser. I don't know that Mr. Blaine was on hand when these resolutions were passed. To the best of my knowledge, Mr. Blaine ceased to be in our employ on September 1st, 1920. I fix that date, I believe, by letter heads that we had received about that date. The letters are in Wichita, Kansas.

*R. E. Crummer, Cross Examination by Mr. Head.*

It is C. J. Moore's signature to the paper you hand me. It is signed, Brown-Crummer Company, By C. J. Moore. Mr. Moore was a buyer. That letter is dated October 18th, 1920, and addressed to J. E. Blaine & Co. Blaine was not in our employ then (The witness was here handed another letter). That is my signature. It bears date November 12th, 1920, and reads this way: "H. W. Head, Esquire, care Merchants and Planters National Bank. Acknowledging receipt of your favor of the 6th inst. would advise that upon receipt of check covering past due coupons on the $10000.00 Gainesville warrants and the additional fee in accordance with supplemental agreement, your draft for $9500.00 will be honored. We are today writing Mr. Blaine, who is familiar with this transaction, as per

the enclosed copy." The Blaine here referred to is J. E. Blaine who was formerly in our employ.

The witness was here handed a letter dated Oct. 8th, 1920, addressed to J. E. Blaine, reading as follows:

"We have today had presented to us draft for $9500.00 drawn by H. W. Head covering $10000.00 Gainesville, Texas, street improvement six per cent warrants, this installment being accompanied with satisfactory proceedings and legal opinion. We will therefore honor the draft upon receipt of check covering the coupons detached from the $10000.00 warrants herewith enclosed, with additional underwriting fee as per the invoice enclosed. Kindly see that check for this amount is promptly forwarded to us, and upon its receipt the draft will be honored. We are also enclosing herewith $2000.00 of the funding warrants"—that is a different matter, I guess. This letter was signed, R. E. Crummer, Vice President. Blaine was not in our employ at this time. Mr. Blaine left our employ to go into the bond business himself, and was representing his own individual interest in buying and selling securities. This transaction, with which he was more or less familiar, had not yet been completed at the time he left our employ, so that a few of the final details, as indicated by these letters, had been referred to Mr. Blaine, and he didn't receive any commission or salary at that time. It was a matter of common courtesy. No, I won't say that this transaction was not completed and we were using Blaine for

the purpose of completing the transaction without paying him a salary.

The witness was here handed a letter dated November 12th, 1920, directed to H. W. Head, c/o Merchants and Planters National Bank, and signed by Brown-Crummer Co., reading:

"Acknowledging receipt of your favor of the 6th inst. would advise that upon receipt of check covering past due coupons on the $10000.00 Gainesville warrants and the additional fee in accordance with supplemental agreement, your draft for $9500.00 will be honored. We are today writing Mr. Blaine who is familiar with this transaction as per the inclosed copy."

Being handed another letter, dated December 3rd, 1920, addressed to H. W. Head, witness said: I dictated that letter. It is my letter. The letter reads: "Replying to your favor of the first inst. would advise that we have been refunded the amount of the detached coupons on your first installment of $10000.00 Gainesville warrants, and draft attached thereto in the sum of $9500.00 paid. We have assurances from Mr. Blaine that funds covering the second set of coupons will be forwarded to us at an early date, and promptly upon their receipt this draft will also be paid, which we trust will be satisfactory."

Continuing, the witness said:

In any matter of details that was referred to Mr. Blaine for three or four months after he left our employ, we relied on him to advise us. This man, Head,

who appeared in this transaction, I never met; I didn't know the man. Mr. Blaine did. When Mr. Head appeared in the transaction—he wasn't even a party to the contract originally—we had to refer such matters as an adjustment there at that end to someone at this point that knew who to talk to: and it seemed that Mr. Head at that time was the individual that had come in the contract. And that is why Mr. Blaine, at those stages, was referred to. When drafts came in with the name, H. W. Head attached, we very quickly assumed that the bank or Mr. Head personally was connected with this transaction, the detail of which I did not know.

The witness was here handed a letter addressed to H. W. Head, dated January 5th, 1921, saying:

"Replying to your letter of the 3rd, would advise that the last installment of the Gainesville, Texas, warrants was taken up yesterday. Just as a matter of record, and in order to complete our files, we would thank you to kindly advise us of your connection with this transaction." I recognize the signature of this letter as mine.

Here, Mr. Weisberg produced a letter dated January 7th, 1921, signed H. W. Head, and addressed to Brown-Crummer Co., Wichita, Kansas, saying:

"As a result of this delay in taking up my draft covering the last installment of the Gainesville, Texas, warrants, my account has been charged with forty days interest, amounting to $101.28. In view of the

very unreasonable delay, it is right that you should bear all or at least a substantial part of this expense. I think when you give it your consideration, you will recognize it as just that you pay all of the charge except such as would have accrued as a result of the payment of the item within the usual and customary time, say ten days at the outside. I will appreciate your check for the amount at your earliest convenience. You of course realize that during the delay you were getting the six per cent interest upon the warrants. My connection with the transaction is simply that I have advanced the Southern Construction Company, who is doing the work, an amount of money, as security for which I took an assignment of all that was to be paid to that company by the city and the citizens for the paving work done by it."

The reply of Brown-Crummer Co., to this letter of H. W. Head was dated January 12th, 1921, and says:

"We have yours of the 7th, concerning forty days interest, which you feel that we should pay, and in reply beg to state that there was some delay in the collection of these warrants, but considerable of it was not chargeable to us, inasmuch as we were unable to obtain payment of the coupons from the city. Upon receipt of the collection here, these coupons were detached and sent to Mr. Blaine of Dallas, according to our usual custom, and the mail was returned to us by the postmaster with the notation that Mr. Blaine was out of town. We afterward returned these to him, and found that we were unable to make delivery to him.

Later, on December, we mailed the coupons to the bank at Gainesville for collection, and received remittance on December 16th. We therefore believe that we should pay you interest on $10000.00 for the time intervening between December 16th and January 4th, the date of our payment of your draft, which would be nineteen days, at six per cent interest, or $31.67. We are enclosing herein our check for this amount, and trust that the same will be entirely satisfactory to you."

*R. E. Crummer, Re-Cross Examination by Mr. Davis.*

Mr. Davis, for the plaintiff here introduced the contract dated June 18th, 1920, between the city of Gainesville and the Brown-Crummer Investment Co.

Q. I see that the Brown-Crummer Company agreed to furnish the resolutions and things of that kind, and agreed to do the printing and to furnish the whole matter, in consideration of five per cent. Can you see now why Mr. Blaine was on hand with those resolutions?

A. Well, frankly; I don't know that Mr. Blaine was on hand. Briefly, we agreed to furnish the services of a competent attorney, and Judge Harris is the man we furnished, and his proceedings were adopted by the city in following out the usual performances in issuing these warrants.

*R. E. Crummer, Re-Direct Examination by Mr. Weisberg.*

The original contract to purchase these bonds was dated November 9th, 1919. The contract recites that

we will approve or disapprove within forty-five days from the date of the contract. The reason for the contract of June 18th, 1920, was because of the delay and the failure of the contractor from whom we originally purchased these warrants to deliver them within anything like the time specified in the original contract. The market had declined to an extent of probably ten per cent during that period, so that someone was obliged to assume a very great loss on account of the big market decline that took place from the date of that original contract up to about this period.

Over the objection of the plaintiff that it was self-serving and hearsay, the defendant, Brown-Crummer Co., here introduced a telegram from J. E. Blaine to Brown-Crummer Co., dated June 17th, 1920, saying: "Wire me here how much more discount we need on Gainesville warrants. Work commences right away in earnest. Would designate time of delivery on balance and some other points. Give me all suggestions you can." Signed, J. E. Blaine. And the reply of Brown-Crummer Co. to it dated June 18th, 1920, saying, "We should have at least five per cent reduction in price of Gainesville warrants to justify us in proceeding under our proposal made in November. Call attention to the provisions of construction contract reciting that work would be completed in one hundred and eighty working days. Under any new proposal we make, delivery should not be extended beyond one hundred days from today. What did they do at Gorman?"

To the admission of this telegram and letter, the plaintiff excepted and took this its bill.

Q. What, if anything does the name, J. E. Blaine & Co., have to do with whether Mr. Blaine was then in your employ or not, referring to the letter of October 8th, 1920, from Brown-Crummer Co., addressed to J. E. Blaine & Co.?

A. Well, Mr. Blaine organized his individual company under the name of J. E. Blaine on or about September 1st, 1920.

Q. J. E. Blaine & Co.?

A. Under the name of J. E. Blaine & Co., and was operating largely in his individual capacity at that time.

Q. Then, the name, J. E. Blaine & Co., indicates that Mr. Blaine was no longer in your employ at that time. Is that what you mean?

A. Yes, sir.

Blaine negotiated the contract for the purchase of the warrants from the Southern Construction Co. in November, 1919, under specific instructions from us. He had no authority to purchase warrants except upon specific authority in each specific transaction. He had no authority to change a contract without specific authority.

*R. E. Crummer, 2nd Re-Cross Examination by Mr. Davis.*

The contract of November 19th, 1919, for the purchase of the warrants for the Southern Construction Co., being here read, the witness said:

That is the original contract with the Levys, and the next contract with the city of Gainesville. It was my understanding that the city of Gainesville assumed some part of the responsibility for all this delay, and they were anxious to get us to continue our commitment with the Southern Construction Company, and offered us five per cent. We got a five per cent discount from the Levys and five per cent from the city. We first agreed to buy the bonds from the Southern Construction Co. on November, 1919, and then in June, 1920, we entered into a contract with the city of Gainesville, by which the city of Gainesville were to pay us five per cent for furnishing the resolutions and the printing and doing everything about it.

*R. E. Crummer, 2nd Re-Direct Examination by Mr. Weisberg.*

Blaine never did report to the Brown-Crummer Investment Co., that these warrants down here were being handled in any other manner than that outlined in the letters that have been introduced in evidence here.

(The Brown-Crummer Investment Co. here rested.)

**Plaintiff's Rebuttal Evidence.**

Plaintiff in rebuttal introduced the following evidence:

Agreement between the city of Gainesville and the Brown-Crummer Investment Co., as follows:

June 18th, 1920.

*The State of Texas, County of Cooke.*

This agreement made this the 18th day of June, 1920, by and pursuant to a motion authorizing the mayor of the city of Gainesville, Texas, to enter into a certain agreement in behalf of the city with the Brown-Crummer Investment Co., Wichita, Kansas, said motion appearing in full in the minutes of the proceedings of the city council of the date of June 18th, 1920, witnesseth:

That for and in consideration of the legal proceedings, furnished for the issuance by the city of Gainesville to the Southern Construction Company of warrants in payment for work and materials furnished in the performance of a certain contract for street improvements between the said city of Gainesville and said Southern Construction Co. and for the furnishing and printing of such warrants as well as all other matters incidental to the issuance of same—it being understood that said issue shall not exceed $50000.00 in amount—the city of Gainesville agrees to pay an amount equal to five per cent (5%) on all such warants issued. The above amount to be paid to the Brown-Crummer Co. as said warrants are taken up by said company.

It is further understood and agreed to between the parties hereto that said sum of 5% shall also apply as to a certain warrant for $3000.00 heretofore issued and taken up by the Brown-Cummer Co.

This agreement is contingent upon the entire issue or so much thereof as may be necessary to pay for work done or materials furnished by the Southern Construction Co. within one hundred (100) working days from the date of this agreement, working days to include all days except Sundays, holidays and days on which it is impossible to work on account of inclement weather the city engineer of Gainesville to be the sole judge of what shall constitue such days.

Witness our hand and seal this the 18th day of June, 1920.

City of Gainesville, Texas,
By E. N. Blackburn, Mayor.
The Brown-Crummer Investment Co.
Attest: By J. E. Blaine, Representative.
S. A. Bryan, City Sec'y.

Contract to Buy Warrants by Brown-Crummer Investment Co.

In this connection, Mr. Wiseberg passed up, and the plaintiff introduced the following contract:

November 19th, 1919.

*To the Hon. Southern Construction Co.*
*Dallas, Texas.*

Gentlemen:

For $50000.00 or more legally issued street paving warrants—bonds of City of Gainesville, delivered to us in Wichita, Kansas, dated December, 1919, and to mature 15 years from date, said warrants—bonds to be in the denomination of $500.00 bearing interest at the

rate of 6% per annum, payable semi-annually, both principal and interest payable at office of Brown-Crummer Co., Wichita, Kansas.

We Will Pay 95 cents on the dollar, we to pay for legal fees, printing of warrants and other expenses incident to the issuance of said warrants. These funds to be paid on estimate of City Engineer of City of Gainesville, Texas.

Provided that prior to the delivery of the above mentioned warrants—bonds to us we are to secure a full and complete certified transcript of the proceedings had incident to and in the issuance of the warrants—bonds that will evidence the legality of same to the satisfaction of our attorney.

We will approve or disapprove within 45 days.

Respectfully submitted,
The Brown-Crummer Investment Co.,
By J. E. Blaine.

Accepted, this the 19th day of November, 1919.
Southern Construction Company,
By Harry D. Levy.

Witness:

R. G. Carraway,
S. G. Donaldson.

Warrants Drawn by E. N. Blackburn, Mayor, and Signed by S. A. Bryan, City Secretary.

The plaintiff introduced five warrants drawn by E. N. Blackburn, mayor, and signed by S. A. Bryan, city secretary, one being for $850.00, dated October 5th, 1920, payable to J. E. Blaine, commission of 5% on estimates for $17000 to Brown-Crummer Co., and another for $500.00, dated October 5th, 1920, payable

to J. E. Blaine, fee in handling paving warrants, another for the sum of $500.00, dated November 2, 1920, payable to J. E. Blaine, commission on $10000.00 to Brown-Crummer Co., another for the sum of $150.00, dated 2nd day of July, 1920, payable to Brown-Crummer Co., 5% on $3000 warrants issued for paving, another for the sum of $500.00, dated September 21st. 1920, payable to Brown-Crummer Investment Co., 5% commission on $10000.00 warrants issued Estimate No. 2, and another for the sum of $500.00, dated November 16th, 1920, payable to J. E. Blaine, additional discount on warrants issued. All the warrants issued by J. E. Blain were endorsed by him and stamped paid, and all the warrants issued to Brown-Crummer Co. were endorsed by it and stamped paid.

That portion of the minutes of the city council at a called session on June 18th, 1920, saying:

"Alderman Buckingham made a motion that the Brown-Crummer Co. be allowed five per cent on the $50000.00 warrant issued or such part as may be used on a 100 day working basis. Motion was carried by a unanimous vote

"Alderman Robbins made a motion that the mayor and secretary be authorized to enter into a contract with the Brown-Crummer Co. Motion carried."

Letter—Harris, McCall & Graham to S. A. Bryan.

Plaintiff introduced a letter dated December 15th, 1919, from Harris, McCall & Graham to S. A. Bryan, as follows:

"You will please find enclosed proceedings to be used by the city council in the passage of an ordinance confirming the contract of the City of Gainesville and the Southern Construction Company, providing for the issuance of interest bearing warrants in payment therefor.

This should be passed at your regular meeting and it is important that the full membership of the city council be present. If this is impossible, we can perhaps approve the ordinance with less than the full membership present. When the ordinance has been passed and entered in your minutes please properly certify the copy we are furnishing and return it to us for use in approving the warrants, and as a permanent record to be retained by the purchasers.

We are not sending the proceedings for your funding issue and the ordinance requested apportioning your tax rate for the present year, but will do that within the next few days. It is important that the contract ordinance be passed now."

And a letter from Harris, McCall & Graham to J. E. Blaine, dated January 2nd, 1920, as follows:

"Your attention is called to two corrections which should be made in the Minutes of the City Council of the City of Gainesville, with reference to the passage of the ordinance confirming the contract between the City of Gainesville and the Southern Construction Company for the construction of certain street improvements in the City of Gainesville.

The certified copy returned to us shows two inadvertent errors which they may correct in their original proceedings, and we are already taking the liberty of correcting the copy sent to us, to-wit:

1. The paragraph immediately following the table of maturities provided in the ordinance, should read as follows:

'Said warrants shall bear interest at the rate of six per cent (6%) per annum from date until paid, interest payable March 1st, 1920, and semi-annually thereafter on the 1st day of September and on the first day of March of each year; which interest is a part of the contract price agreed to between the parties, principal and interest on said warrants shall be payable at the office of the Brown-Crummer Investment Co., Wichita, Kansas.'

You will note that the copy furnished us omits the following clause:

'Which interest is a part of the contract price agreed to herein.'

A. The copy furnished us shows that a tax levy of eight cents per annum was levied. The figure eight is a typographical error and should read nine cents.

We have made these corrections in our copy and trust that you will see that the same errors do not occur in the original record.

If you have not furnished the Brown-Crummer Company with the written signatures of the Mayor and City Secretary, please do so at once."

And also a letter from J. E. Blaine to S. A. Bryan, dated, Wichita, Kansas, January 8th, 1920, as follows:

"I am handing you herewith letter received from Harris, McCall & Graham, which is practically self-explanatory.

Won't you please look at your original record on the minutes and be sure that the corrections enumerated are made, and advise me.

Please change my address to P. O. Box 745, as the fire in the North Texas Bldg. a few days ago put us completely out of business."

And also a letter from Brown-Crummer Investment Co., By J. E. Blaine to S. A. Bryan, dated, Wichita, Kansas, January 8th, 1920, as follows:

"Am enclosing herewith estimate No. 1 for Levy & Levy which I will thank you to give to them.

Am mailing same to you on account of there being no one in their office and I was not sure at what time they would be ready to use this."

And also a letter from Harris, McCall & Graham, to J. E. Blaine, dated January 8th, 1920, as follows:

"You will please find enclosed, the proceedings which may properly be passed by the City Council of Gainesville, Texas, in approving the first estimate of Messrs. Levy and Levy for the paving work they have contracted to do in the City of Gainesville. Attached to the resolution to be passed by the council you will find the delivery papers to be executed by the proper officials accompanying the first installment of warrants.

The proceedings and delivery papers, when properly executed, should be attached to Warrant No. 1, and submitted to us for approval. The remaining warrants received in payment for estimate No. 1 may be attached to the draft of Messrs. Levy & Levy and forwarded to the American State Bank, Wichita, Kansas. The draft will be paid by the Brown-Crummer Company as soon as we have wired the company that the first installment of warrants has been approved."

Also a letter from J. E. Blaine to S. A. Bryan, dated April 7th, 1920, as follows:

"Herewith papers in the funding issue which you will need to have changed or have Mr. Garmany sign the warrants. I trust he will be able to do the latter.

Don't forget to give the amounts and issues of the Liberty Bonds on hand."

Also a letter from R. E. Crummer, Vice President to the City Treasurer of Gainesville, dated September 27th, 1920, as follows:

"We have today taken up from the Southern Construction Company, the $10000.00 City of Gainesville warrants numbers 41 to 50 inclusive, awarded on your recent estimate, and therefore enclose herewith statement covering the matured coupons detached therefrom, together with the 5% fee according to the supplementary agreement of June 18th, 1920, making a balance due us of $966.70 for which amount we will thank you to kindly remit us your check by early mail, and greatly oblige."

And also a letter, dated September 29th, 1920, from R. E. Crummer, Vice President, to City Treasurer, Gainesville, Texas, as follows:

"We have today received from Mr. Blaine check for $500.00 covering concession due on the recent $10000.00 installment delivered us which would therefore leave the amount of your remittance to cover only the coupons mailed you yesterday, for which we shall hope to receive your check at any early date."

Treasury Warrants Payable to J. E. Blaine and Brown-Crummer Co.

The plaintiff introduced a treasury warrant dated on the 5th day of October, 1920, payable to J. E. Blaine for $850.00, 5% commission on estimate for $17,000 for Brown-Crummer Co. This warrant was signed, E. N. Blackburn, mayor, S. A. Bryan secretary, and it was endorsed and paid.

Next, a warrant for $500.00 signed in the same way, payable to J. E. Blaine, dated October 5th, 1920, and endorsed by J. E. Blaine, and marked paid;

And next, a warrant for $500.00, signed in the same way, dated November 2nd, 1920, payable to J. E. Blaine, concession on $10000.00 warrants to Brown-Crummer Co. This warrant is endorsed and marked paid.

Next, a warrant for $150.00 signed in the same way, dated July 2nd, 1920, payable to Brown-Crummer Co., five per cent on $3000.00 warrants, issued for paving.

Next, a warrant dated September 21st, 1920, signed in the same way, payable to Brown-Crummer Co. for $500.00, discount on $10000.00 warrants issued on estimate No. 2, and next, a warrant for $500.00 signed in the same way, payable to J. E. Blaine, additional discount on warrants issued. And a warrant for $500.00 dated Oct. 5, 1920, signed in the same way payable to J. E. Blaine, fee in handling paving warrants, endorsed and stamped paid.

*Lee Lewis, Direct Examination.*

LEE LEWIS, for the plaintiff, testified:

My name is Lee Lewis. I live in Gainesville. I think I was a member of the city council in 1920—about that time, or 1921. I was a member of the council at the time the resolutions were passed for issuing paving warrants to the Southern Construction Co. The council met at night, at about 7:30 p. m. I knew Mr. Blaine. He was before the council. Well, he negotiated this warrant deal for the Southern Construction Co. and the city, I believe—was my understanding.

Q. Who furnished the resolutions that were passed? A. Well, the Brown-Crummer Co.—the contract that we had with them, that they should furnish all resolutions necessary to preparing the warrants for sale, and all we had to do was to pass on them. Well, I suppose Mr. Blaine brought the resolution to the council. Mr. Blaine was there. When the resolutions were passed for the $3000.00 and the $17000.00 and

the $10000.00 bond issue, all the paving had not been done. The brick paving had not been done. Well, the reason the warrants were issued in advance of the work, according to the contract, they were to be delivered at a certain time and sold at a certain price, under the contract with the Southern Construction Co. and that time had expired on account of rain beyond the control of the Brown-Crummer Co. and the City of Gainesville and it was necessary to an extension of time, and we were advised by the city attorney, Mr. Adams, that those warrants could be issued—and by Hayden W. Head, at Sherman—that those warrants could be issued and could be delivered at the proper time and they were issued at that time by the city council and were supposed to be held by Mr. Head. They were to be placed in escrow by Mr. Head. Mr. Blaine certainly should have known about it. He was there. He knew what paving had been done. It is not my understanding that the warrants should be turned over to the Southern Construction Co. They were not entitled to the warrants. They were to be held in escrow. Mr. Head was supposed to be responsible for those warrants as well as the surety company bond back of them. All the council should have known at that time of the passage of those resolutions the work hadn't been done. I knew it.

The Court: Let me be sure that I understand you. These bonds were to be placed in escrow with Mr. Head?

A. Yes, sir.

I think it was the intention to deliver the warrants as the work progressed. However, the city attorney advised that they ought to be issued as such had been done in different cases. The plan was to deliver the warrants as the work progressed and certificates were given by the council and engineer that the work had been done. We signed quite a lot of instruments that were presented to us. I am not sure that the certificates were signed at the time of the delivery of the warrants or before then. All the resolutions were passed at night if I remember right. Sometimes we had meetings in the day time, but I don't think we considered any paving.

Q. I see there was a certified copy made at the same time the resolution was passed. Now, who furnished that copy to the secretary? A. I don't know.

Well, I wouldn't be positive that Mr. Blaine was there that night. He was there a number of times, when these different ones were passed. I couldn't say positive that he was there at that time.

Q. I see on the same date, on October 5th, 1920, all of them signed an affidavit made before Frank Morris. Did you ever read that affidavit? A. I didn't read it. No. I wouldn't be positive that I signed the affidavit. I was under the impression that it was passed at the meeting and presented the next meeting for signature. Frank Morris presented it. However, most of them were signed at the city council. Frank Morris brought the affidavit to me. I don't remember whether the resolution of October 5th, 1920, was really

read to the council. I presume it was. Some of them were read. When Mr. Blaine was up there, he was at the council meeting as usual. Blaine did not carry the papers around himself to have them signed up, but he was there at Gainesville at the time.

Q. On the 2nd day of November, 1920, a resolution was passed for the issuance of $10000.00 of warrants. A copy of it was certified to on the 2nd day of November and there is attached an affidavit signed by all the aldermen on the 2nd day of November. Now how was that work done so rapidly as all that? You met at night. A. Ben Thomason was at the council meeting, I think, in that instance.

Q. You had a notary down there at night waiting? A. Yes, sir. That was usually the case. I can't say whether Mayor Blackburn was there or not, but they took it to the house, I guess, if he wasn't. The resolution says he was there so he ought to have been there.

*Lee Lewis, Cross Examined by Mr. Weisberg.*

At night was the regular time for the meeting of the council. The regular meeting was always held at night unless there was a called session. We had enough light to see what the papers were.

Q. Mr. Lewis, it is a fact, isn't it, that there was for a time a lot of material on hand, wasn't there, that later was moved away? A. Yes, sir, that's a fact.

*Lee Lewis, Re-Direct Examination by Mr. Davis.*

Q. The material was later moved away? A. Yes, sir, I think so.

Q. What material was moved away from there? A. Well, they had a lot of cement, supposed to have, in the court house, and it was shipped to Sherman.

Q. Did you ever see the cement? A. I didn't, but the city engineer told me they moved it away.

*W. P. Springfield, 2nd Recall by Plaintiff.*

W. P. SPRINGFIELD, recalled by the plaintiff, testified:

When the Levys quit, they had no cement on hand that I know of. They had some clay brick, but no acceptable paving brick that I saw. The Levys had no cement at the beginning. To start with, I bought what I could get from lumber yards at three different towns. I was street commissioner and bought the cement. I finally got pay for it. I liked not to have got it though. They gave me bogus checks all the time for it. The checks would be turned down. Yes, sir. They give me checks on banks that they never had done any business with.

*W. P. Springfield Cross Examination by Mr. Weisberg.*

I got my money from the Levys.

*W. P. Springfield, Re-Direct Examination by Mr. Davis.*

I finally got payment for the cement.

*W. P. Springfield, Re-Cross Examination by Mr. Weisberg.*

I was not a member of the city council. I was just an employee.

(This closed the testimony.)

**Requested Charges by Plaintiff.**

At the close of the evidence, the plaintiff, City of Gainesville, presented to the court in writing, separately, each of the following requested charges:

1. The treasury warrants issued by the City of Gainesville to the Southern Construction Company described in the pleadings are void and of no validity, because issued without the consent of the qualified voters of the City of Gainesville granted at an election held for that purpose.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
*Attorneys for Plaintiff.*

2. The contract between the City of Gainesville and the Southern Construction Company and all proceedings thereunder are void, because said contract, among other things, was made without any preliminary estimate of the cost of the proposed street improvement as prescribed by the charter and the statute.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
*Attorneys for Plaintiff.*

3. Under Section 28, Art. 2 of the Charter of the City of Gainesville, contracts are required to be let to the lowest responsible bidder, after the adoption of specifications and the giving of notice. The contract in question having been changed in material respects

after the bids were received, without being re-opened to competitive bidding as changed, is void.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
*Attorneys for Plaintiff.*

4. The warrants issued by the City of Gainesville to the Southern Construction Company are not negotiable instruments, and anyone acquiring such warrants takes subject to any defense that the city would have against them in the hands of the original holder.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
*Attorneys for Plaintiff.*

5. Under the Charter of the City of Gainesville in respect to street improvement the city could not pay for the paving of streets by the issuance of long-time warrants; but if without funds to pay for such improvement, the money therefor could only be raised by the issuance of bonds pursuant to the consent of the qualified voters granted at an election held for that purpose; and that not having been done in this case the contract and the warrants issued pursuant thereto are illegal and void.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
*Attorneys for Plaintiff.*

6. The instructions to bidders in the specifications and contract in question required that the contractor in the employment of labor should give preference to the citizens of Gainesville; and in default of citizens of Gainesville, to citizens of the State of Texas. These provisions were illegal and interfered with fair competition and rendered the contract and all proceedings thereunder void.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
*Attorneys for Plaintiff.*

7. The unquestioned proof shows that the City of Gainesville received no consideration for $15263.73 of the series of $50,000.00 of warrants issued by it, and that said excess of warrants over the amount of paving done are without consideration and uncollectable.

W. L. BLANTON,
W. O. DAVIS,
CECIL MURPHY,
*Attorneys for Plaintiff.*

8. In the acquisition of the warrants notice to the agent is notice to the principal, and if J. E. Blaine knew that the warrants in question were issued before the paving, as to which each set of warrants, applied, was done and were issued when nothing was due under the contract, then the Brown-Crummer Company is in no better position than the Southern Construction Company, and the Brown-Crummer Company acquired

such bonds, if at all, subject to all the defenses the City of Gainesville had against them.

W. L. Blanton,
W. O. Davis,
Cecil Murphy,
*Attorneys for Plaintiff.*

9. If J. E. Blaine was the agent of Brown-Crummer Co. in the purchase of the warrants in question and during said agency and before Brown-Crummer Co. received the warrants and paid therefor said Blaine knew that they were issued for paving not done and in advance of the performance and acceptance of the work, then the Brown-Crummer Company acquired such warrants subject to all the defenses the City of Gainesville had against the same.

W. L. Blanton,
W. O. Davis,
Cecil Murphy,
*Attorneys for Plaintiff.*

10. If the evidence shows that J. E. Blaine was the agent of the Brown-Crummer Company you are then instructed that the knowledge of Blaine would be the knowledge of the Brown-Crummer Company. You are further instructed that in order for Blaine to have been the agent of Brown-Crummer Company it was not necessary for him, at the time of the transactions, to have been in their employ, receiving a salary, but if they entrusted him with the handling of the transactions with regard to the warrants and the purchase of the same, and carrying out these transactions,

then you are instructed that this was sufficient to constitute him an agent.

W. L. Blanton,
W. O. Davis,
Cecil Murphy,
*Attorneys for Plaintiff.*

11. It appears from the evidence that Mr. Harris was the attorney for Brown-Crummer Company in preparing sundry papers in the case, by virtue of which certain ordinances were passed and the warrants issued; you are instructed that the knowledge of Mr. Harris was the same as the knowledge of Brown-Crummer Company.

W. O. Davis,
W. L. Blanton,
Cecil Murphy,
*Attorneys for Plaintiff.*

12. The contract for the paving and the ordinances under which it was made prescribe that the abutting lot owner shall pay for three-fourths of the cost of the improvement in front of his property, in three annual installments, bearing interest at the rate of eight per cent per annum, while the charter required that the abutting lot owner should pay for only two-thirds of the cost of improvement in front of his property, and that the assessments therefor should be payable in equal annual installments, not less than five in number; the failure of the contract and ordinances to comply

with the charter in these respects renders the contract and all proceedings thereunder void.

W. O. Davis,
W. L. Blanton,
Cecil Murphy,
*Attorneys for Plaintiff.*

The court, after close of the evidence and before the retirement of the jury, refused each of the above requested charges, and the city of Gainesville duly excepted.

After the close of the evidence and before the retirement of the jury, the plaintiff, the city of Gainesville orally requested the court to give the following charge:

The contract between the city of Gainesville and the Southern Construction Co. is void because the unquestioned proof shows that the contract was awarded within less than forty-eight hours after the bids were opened.

The above instruction, the court in like manner refused to give to which the plaintiff duly excepted.

**Charge of the Court.**

Upon the conclusion of the evidence, the court give to the jury the following written charge:

*Gentlemen of the Jury:*

This suit by the city of Gainesville involves a controversy arising from a contract executed by the council of said city for the improvement of its streets. Warrants were issued by the city to the extent of fifty

thousand dollars in payment of its part of said improvements. The testimony shows that some of the warrants were issued before all of the work had been completed, and that the value of the work actually performed is less, to the extent of about fifteen thousand dollars, than the face value of the warrants.

The warrants in question were delivered to Mr. H. W. Head by virtue of an arrangement that contemplated the execution by him of an obligation, duly secured, which, among other things, provided that the proceeds would not be paid to the contractors except in such amounts as the mayor of the city should attest to be due. Judgment is asked against the estate of Mr. Head and against his surety, on the claim that the warrants were improperly or improvidently delivered.

The warrants referred to were purchased in good faith by the Brown-Crummer Investment Company, who have also been made parties to this suit; and judgment is asked against that concern also that the warrants, for reasons set out in the pleadings, and to the extent of forty-seven thousand dollars, be held invalid and to constitute no binding obligation against the city.

The evidence shows, in my opinion, that the city council had authority, under its charter, to execute the contract in question, and likewise to place the warrants with Mr. Head under the conditions disclosed by the evidence. It is my idea that the conditions of the obligation assumed by him have been discharged—

that is, certificates, over the signature of the mayor of the city, attesting that work was done by the contractors of the value of said warrants, were furnished him.

In this state of affairs, I do not think judgment can properly be rendered against his estate herein. Then I think too, that the city, under all the circumstances, is estopped from claiming, as against the Brown-Crummer Company, that the warrants in question are invalid. It is true, full value does not appear to have been received; but it is an instance where those delegated with authority to perform acts for the city have caused the issuance of the warrants in question and the purchase of them by parties who acted in good faith, and, for a valuable consideration.

There is therefore no issue of fact for you to settle. The city, as a matter of law, it seems to me, can be held responsible for the obligations, and is not entitled to a judgment in this case. You are therefore directed to return a verdict in the form hereto attached.

W. L. Estes,
*Judge.*

**Exceptions to Charge of the Court by Plaintiff.**

The plaintiff, the city of Gainesville, upon the reading of said charge and before the retirement of the jury, excepted to that portion of the charge instructing a verdict in favor of the defendant, Head, and the Southern Surety Company, and also to that portion of the charge directing a verdict against the city of

Gainesville in favor of the Brown-Crummer Investment Co., and also excepted to the instruction to the effect that the Brown-Crummer Investment Co., were bona fide purchasers and that the city was estopped against them, for there is ample proof to carry the case to the jury showing that J. E. Blaine was the agent of the Brown-Crummer Investment Co., in the transaction and had full knowledge that the warrants were issued without consideration and before a report of the engineer and the doing of the paving. The plaintiff also excepted to that portion of the instructions that directs the jury to return a verdict in favor of the Brown-Crummer Investment Co., each of which exceptions and objections was overruled by the court and the plaintiff duly excepted.

**Order Approving Bill of Exceptions.**

This bill together with the additions and qualifications attached hereto contains all of the evidence produced upon the trial and the plaintiff asks that the same be approved, certified and made a part of the record.

In order that all the matters aforesaid may be made of record, I, W. L. Estes, district judge, before whom said cause was tried, do hereby sign and seal this bill of exception on this the 28th day of June, 1926.

W. L. Estes,
*Judge of the United States District Court for the Eastern District of Texas.*

**Additions and Qualifications to Bill of Exceptions by the Court.**

*In the District Court of the United States,*
*Eastern District of Texas,*
*Sherman Division.*

*No. B. L. 241.*

*City of Gainesville, Plaintiff.*

vs.

*Southern Construction Company, et al., Defendants.*

This is to certify that the attached bill of exception is signed and sealed by me, with the following qualifications and additions, which are made a part of said bill of exception, the same as if fully and at large set out therein:

The charter of the city of Gainesville referred to in the bill of exception also contains the following provisions:

Article 2, of Section 1, of said charter, provides that the city of Gainesville "may contract and be contracted with."

Section 3, of Article 2, of said city charter, reads as follows:

"Sec. 3. *Powers of Ordinance.* The city of Gainesville shall have power to enact and enforce all ordinances necessary to protect health, life and property, and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the city and its inhabitants, to protect lives, health and property of the inhabitants of said city, and to enact and enforce any and all

ordinances upon any subject; provided, that no ordinance shall be enacted inconsistent with the laws of the State of Texas, or inconsistent with the provisions of this act; and provided further, that the specifications of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this act to grant to and bestow upon the inhabitants of the city of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter or by some general law of the State of Texas, or by the provisions of the Constitution of the State of Texas."

Article 2, Section 5, of said city charter reads as follows:

"Sec. 5. *Street Power and Service.* The city of Gainesville shall have and exercise exclusive power and control over the streets, avenues, alleys, highways, crossings and public grounds within the city, and the council shall have power to abate and remove all encroachments and obstructions thereon; to open, alter, abolish, widen, extend, establish, regulate, grade, pave, macadamize, drain, clean or otherwise improve said streets, avenues, alleys, highways, crossings, etc., and to protect the same from all encroachment and injury of every kind whatsoever."

Section 1, of Article 3, of said city charter authorizes the city council to levy annually for general purposes and for paying bonded indebtedness, *ad*

*valorem* taxes on all real, personal and mixed property within the territorial limits of said city.

Article 7, Section 10, of said city charter, also contains the following provision:

"A special session (of the city council) may be called by a majority of the members of the city council whenever they deem it expedient to do so, and it is hereby declared to be the duty of every member of the city council to attend such special session as may be called."

The resolution passed by the city council of Gainesville on December 16, 1919, was recorded in Book 7, pages 38, *et seq.*, of the minutes of said city council, and is in terms and language as follows:

City Hall
City of Gainesville, Texas.
December 16th, 1919.

The city council of the city of Gainesville, Texas, met in regular session, at the city hall, in said city, on this the 16th day of December, A. D. 1919,

Present:

E. N. Blackburn, Mayor,
Geo. A. Beck,
J. A. Thomas,
J. E. Bramble,
C. M. Buckingham,
W. B. Nowell,
Lee Lewis,
J. W. Puckett, Alderman,
R. L. Kendall,
R. G. Barrett,
T. F. Robbins, and
S. A. Bryan, City Secretary,

Absent: None,

a quorum was announced present, when the following proceedings, among others, were had, to-wit:

The mayor presented to the council, for consideration and passage, an ordinance entitled— "An ordinance confirming contract between the city of Gainesville and the Southern Construction Company, a copartnership, contractor, for the furnishing of the necessary materials, machinery and labor for constructing certain street improvements in and for the city of Gainesville, Texas, in accordance with proposal of contractor and plans signed by both parties thereto and made part thereof; providing for the issuance of city of Gainesville street improvement warrants as evidence of the city's debt therefor: Providing for the levy of a tax to pay the interest thereon and create a sinking fund for its redemption at maturity: And declaring an emergency."

Moved by Alderman Robbins, seconded by Alderman Beck, that the ordinance be read in full, motion carried and the ordinance was read by the secretary.

Moved by Alderman Robbins, seconded by Alderman Beck, that the ordinance pass its first reading.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Moved by Alderman Robbins, seconded by Alderman Beck, that the rule requiring ordinances to be passed at three several meetings of the city council be suspended and that said ordinance pass its second and final readings by caption.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Said ordinance was read second time, by caption, and passed by the following vote:

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Moved by Alderman Robbins, seconded by Alderman Beck, that said ordinance be placed upon its third and final passage.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

Moved by Alderman Robbins, seconded by Alderman Beck, that the ordinance be finally passed.

Ayes: Alderman Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Puckett, Kendall, Barrett, Robbins.

Nays: None.

The ordinance as follows:

"An ordinance confirming contract between the City of Gainesville and the Southern Construction Company, a co-partnership, contractor, for the furnishing of the necessary materials, machinery and labor for constructing certain street improvements in and

for the city of Gainesville, Texas, in accordance with proposal of contractor and plans signed by both parties thereto and make part thereof: Providing for the issuance of City of Gainesville Street Improvement warrants as evidence of the city's debt therefor: Providing for the levy of a tax to pay the interest thereon and create a sinking fund for its redemption at maturity; and declaring an emergency."

Whereas, the city council of the City of Gainesville, Texas, has heretofore determined the necessity for the construction of certain street improvements and the city council, and the City of Gainesville, pursuant there to, on the 20th day of November, 1919, acting by and through its mayor and city secretary and the said Southern Construction Company, a co-partnership, contractor, entered into contract for the construction of said street improvements in accordance with plans, specifications, and proposal which are attached to and form a part of said contract, which is in words and figures as follows, to-wit:

Proposal.

*To the City of Gainesville, Texas.*

Gentlemen:

Pursuant to the foregoing instructions to the bidders the undersigned bidder proposes to do all the work, furnish all the material upon which he bids, as provided by the attached plans and specifications, and binds himself on acceptance of his proposal to execute a con-

tract and bond, according to the attached forms, for the performance and completion of the said work in the time specified.

| Items | Written Price | Figures |
|---|---|---|
| Price per sq. yd. for 3'' Vertical Fiber Brick pavement complete on a 5'' concrete foundation | Three and 40/100 Dollars, | $ 3.40 |
| Price per sq. yd. for 3'' Vertical Fiber Brick pavement complete on a 4'' concrete foundation | Three and 20/100 Dollars, | $ 3.20 |
| Price per sq. yd. for 2½'' Vertical Fiber Brick pavement complete on a 5'' concrete foundation | Three and 25/100 Dollars, | 3.25 |
| Price per sq. yd. for 2½'' Vertical Fiber Brick | | |

| | | |
|---|---|---|
| pavement complete on a 4'' concrete foundation | Three and 05/100 Dollars, | 3.05 |
| Price per sq. yd. for Tarvia treatment pavement complete on a 6'' gravel foundation | One and 23/100 Dollars, | 1.23 |
| Price per lin. ft. for stone concrete comb. Curb and Gutter | Eighty Cents | .80 |
| Price per lin. ft. for gravel concrete comb. Curb and Gutter | Seventy Five Cents | .75 |
| Price per lin. ft. for stone concrete comb. Curb and Gutter | Eighty Cents | .80 |
| Price per lin. ft. for gravel concrete separate Curb | Fifty Five Cents | .55 |
| Price per lin. ft. for stone concrete separate Curb | Sixty Eight Cents | .68 |
| Price per lin. ft. for gravel concrete separate Gutter | Forty Eight Cents | .48 |
| Price per lin. ft. for stone concrete separate Gutter | Fifty Seven Cents | .57 |

| | | |
|---|---|---|
| Price per lin. ft. for stone separate Curb | Forty Five Cents | .45 |
| Price per lin. ft. for oak headers in place | Fifty Cents | .50 |
| Price per cu. yd. for concrete in culverts, etc. | Eighteen Dollars | 18.00 |
| Price per lb. for reinforcing steel in Culverts, etc. | Thirty Five Cents | .35 |
| Price per cu. yd. for Earth excavation | Seventy Five Cents | .75 |
| Price per cu. yd. for Rock excavation | Three Dollars | 3.00 |
| Price per cu. yd. for Over-haul per 100 ft. | Two Cents | .02 |
| Price per pound for Culvert plates | Twenty Five Cents | .25 |
| Price each for Catch Basins complete in place | Fifty Five Dollars | 55.00 |
| Price per sq. ft. for four inch cement walk | Twenty Three Cents | .23 |
| Cost per day for common Labor on extra work | Four Dollars | 4.00 |
| Cost per day for team labor on extra work | Seven dollars | 7.00 |

The undersigned bidder agrees to accept deferred payments on contracts with property owners in one (1) and two (2) years, and to charge interest on the same at the rate of eight (8) per annum.

The undersigned bidder agrees to complete the work upon which he has bid, within one hundred eighty (180) working days, from acceptance of his bond by the city.

Southern Construction Company
By Harry D. Levy,
Dallas, Texas.

Contract.

*The State of Texas, County of Cooke.*

This agreement made and entered into this the 20th day of November, A. D. 1919, by and between the City of Gainesville, Cooke County, Texas, party of the first part, hereinafter called the city, and the Southern Construction Company, of Dallas, Texas, party of the second part, hereinafter called the contractor.

Witnesseth: That for in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the said party of the first part, and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed, the said party of the second part agrees with the said party of the first part to commence and complete the construction of certain street improvements and all extra work in connection therewith as stated in the general specifications, and at his own proper cost and expense

to furnish all tools, materials, machinery, labor, supervision and other accessories necessary for the said construction in accordance with the conditions and prices stated in the proposal attached hereto, and in accordance with the plans and specifications therefor as signed by the parties hereto, all of which are made a part hereof, and all in the manner and under the conditions hereinafter specified:

All the provisions of this agreement shall be performed in the City of Gainesville, Texas, and any suit to enforce its provisions or for damage for breach thereof shall be brought in Cooke County, Texas.

In witness whereof, the city has caused its seal to be hereto affixed, and these presents to be signed by its mayor and attested by its city secretary, and the party of the second part have hereto set their hands and seal on the day, month and year first above mentioned.

The City of Gainesville,
Texas.
Party of the first part.
By E. N. Blackburn, Mayor.
The Southern Construction
Company.
Party of the second part.
By Harry D. Levy.

Attest:

S. A. Bryan
City Secretary.

Witness:

R. G. Carraway.

## Supplemental Contract.

*The State of Texas, County of Cooke.*

*Know all men by these Presents:*

That, whereas, under date November 20th, 1919, a contract was made by and between the City of Gainesville, Cooke County, Texas, and the Southern Construction Company, a co-partnership composed of Harry D. Levy and Lester Levy, of the State of Texas and County of Dallas, providing for certain street improvements to be made by said Southern Construction Company for said City of Gainesville, which contract is duly of record in the minutes of the city council; and

Whereas, on the same date a supplemental contract was made by and between said parties, authorizing a modification of the provisions for a bond in said contract, which supplemental contract is also duly of record in the minutes of said city council; and

Whereas, said contract provides for payments to be made in money by said City of Gainesville for said labor, materials and supervision; and

Whereas, it now appears to all parties that the City of Gainesville will not have funds in money available for said purpose, as payments shall become due:

Now, therefore, for and in consideration of the extension of the maturities in the payments for said labor, materials and supervision, the said city hereby agrees to issue in payment for said labor, materials and supervision interest bearing warrants, to be designated "City of Gainesville Street Improvement Warrants,

Series ....," to be dated November 20th, 1919, bearing interest at the rate of six per cent (6%) per annum, interest payable semi-annually on such dates as may be found advisable by said city, maturing serially in approximately one (1) to twenty (20) years; and

Whereas, in consideration of the interest to be paid on said warrants, which is hereby made a part of the contract price, the Southern Construction Company has agreed to accept said warrants in payment for said labor, materials and supervision, said warrants to be issued upon the completion of said contract or upon legally approved estimates.

Now, therefore, it is hereby agreed that the payments under the terms of this contract shall be made as herein specified and said city through its duly authorized officials, binds itself to issue legal warrants for said purpose.

In witness whereof, we have hereunto set our hands and seals this the 20th day of November, 1919. Executed in duplicate.

The City of Gainesville, Texas.
By E. N. Blackburn, Mayor.
The Southern Construction Company,
By Harry D. Levy,
Lester Levy.

Attest:

S. A. Bryan,
City Secretary.

And, Whereas, said contract, and supplements thereto is based upon specifications prepared and submitted to and approved by the Mayor and City

Council, and was let and entered into after proper advertisement inviting competitive bids for the work proposed to be done, which advertisement is as follows:

Notice to Paving Contractors.

Sealed bids will be received until 8:00 p. m. November 18th, 1919, by S. A. Bryan, Secretary of the City of Gainesville, Texas, for furnishing all material and labor for the construction of approximately 31,000 square yards of street paving, 10,000 lineal feet Curb and Gutter. A certified check for the sum of $1000.00 payable to the order of Hon. E. N. Blackburn, Mayor, must accompany each bid. Plans and specifications may be obtained at the office of the engineer R. G. Carraway Company, Gainesville, Texas, upon a deposit of $10.00. The city of Gainesville, Texas, reserves the right to reject any or all bids and to waive formalities.

Which said advertisement appeared in the Daily and Weekly Hesperian, a daily newspaper published in said said City of Gainesville, in the issues of the 6th day of November, 1919, to the 16th day of November, 1919, in not less than ten issues; and

Whereas, all bids submitted were sealed and opened in the presence of a majority of the Aldermen, and did remain on file in the Mayors Office open for public inspection at least forty eight hours before said contract was awarded to the successful bidder, and in said advertisement the City reserved the right to reject any and all bids and pending the advertisement of the work and contract proposed specifications therefor did

remain on file in the Office of the Mayor subject to inspection of all parties desiring to bid:

Whereas, said Southern Construction Company, a co-partnership composed of Harry D. Levy and Lester Levy of the County of Dallas, State of Texas, have given a bond in accordance with Section 29 of the Charter of said City securing the faithful performance of said contract and securing the rights of subcontractors, materialmen and laborers.

And Whereas, said contract has been read and duly considered and understood;

Therefore, be it ordained by the City Council of the City of Gainesville, Texas:

That said contract be and the same is hereby in all things approved, ratified and confirmed as the act and contract of this Council and of the City of Gainesville, Texas, and the same shall have effect according to its tenor and purport; and it being agreeable to the parties signing said contract that payment for said street improvements be made by the issuance of six per cent (6%) interest bearing street improvement warrants, maturing one (1) to Twenty (20) years, which warrants the City of Gainesville has agreed to issue, and the said Southern Construction Company, Contractor, has agreed to accept in payment therefor;

Therefore, It Is Further Ordained that in accordance with said contract and agreement, warrants of the City of Gainesville to be called "City of Gainesville Street Improvement Warrants, Series ....," be issued in the sum of Fifty Thousand ($50,000.00)

Dollars, payable to the said Southern Construction Company, Contractor, their assigns or bearer, evidencing the indebtedness due said Contractor by the City of Gainesville, under and by virtue of said contract.

Said warrants shall be numbered from one (1) to fifty (50) inclusive, shall be in the denomination of One Thousand ($1,000.00) Dollars each, aggregating Fifty Thousand ($50,000.00) Dollars, shall be dated November 20th, 1919, and shall become due and payable as follows, to-wit:

| Warrant Numbers | Maturity Dates | Amount |
|---|---|---|
| 1 & 2 | March 1, 1921 | $2000.00 |
| 3 & 4 | March 1, 1922 | 2000.00 |
| 5 & 6 | March 1, 1923 | 2000.00 |
| 7 & 8 | March 1, 1924 | 2000.00 |
| 9 & 10 | March 1, 1925 | 2000.00 |
| 11 & 12 | March 1, 1926 | 2000.00 |
| 13 & 14 | March 1, 1927 | 2000.00 |
| 15 & 16 | March 1, 1928 | 2000.00 |
| 17 & 18 | March 1, 1929 | 2000.00 |
| 19 & 20 | March 1, 1930 | 2000.00 |
| 21, 22 & 23 | March 1, 1931 | 3000.00 |
| 24, 25 & 26 | March 1, 1932 | 3000.00 |
| 27, 28 & 29 | March 1, 1933 | 3000.00 |
| 30, 31 & 32 | March 1, 1934 | 3000.00 |
| 33, 34 & 35 | March 1, 1935 | 3000.00 |
| 36, 37 & 38 | March 1, 1936 | 3000.00 |
| 39, 40 & 41 | March 1, 1937 | 3000.00 |

| | | |
|---|---|---|
| 42, 43 & 44 | March 1, 1938 | 3000.00 |
| 45, 46 & 47 | March 1, 1940 | 3000.00 |

Said warrants shall bear interest at the rate of six per cent (6%) per annum from date until paid, interest payable March 1st, 1920, and semi-annually thereafter on the 1st day of September and on the 1st day of March of each year; principal and interest on said warrants shall be payable at the Offices of the Brown-Crummer Investment Company, Wichita, Kansas.

Said warrants shall be signed by the Mayor, countersigned by the City Secretary, and registered by the City Treasurer, and the seal of the City shall be impressed upon each of them. The facsimile signatures of the Mayor and City Secretary may be lithographed upon the coupons attached to each of said warrants.

Said warrants shall be in substantially the following form:

No. ....

United States of America

*State of Texas, County of Cooke.*

City of Gainesville Street Improvement Warrant,

**Series** ....

This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to The Southern Construction Company, Contractor, their assigns or bearer, on the 1st day of March, 19.., at the Offices of The Brown-Crummer Investment Company, Wichita, Kansas, the sum of

One Thousand Dollars

in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the 1st day of March, 1920, and semi-annually thereafter on September 1st and March 1st of each year; and the City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest payable at the place above named, upon presentation and surrender of warrant or proper coupon.

This Warrant Is one of a series of Fifty (50), inclusive, in the denomination of One Thousand ($1,000.00) Dollars, issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to The Southern Construction Company, their assigns or bearer for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20th, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and laws of the State of Texas, and pursuant to an ordinance passed by the City Council of said City of Gainesville, Texas, on the 2nd day of December, 1919, recorded in Book 6, at page 570, *et seq.*, of the Minutes of said City Council.

The Date of this warrant, in conformity with the ordinance above mentioned is November 20th, 1919.

And It Is Hereby Certified And Recited That all acts, conditions and things required to be done prec-

edent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation.

In Witness Whereof the City of Gainesville has caused the corporate seal of said City to be hereto affixed and this warrant to be signed by its Mayor, and countersigned by its City Secretary, and registered by the City Treasurer, as of the date last above written.

E. N. Blackburn,
Mayor, City of Gainesville, Texas.

Countersigned:
S. A. Bryan,
City Secretary, City of
Gainesville, Texas.

W. H. Garmany,
City Treasurer, City of Gainesville, Texas.

The form of interest coupon shall be substantially as follows:

No..... On The 1st Day Of March 1920 $30.00

the City Treasurer of the City of Gainesville, Texas, will pay to The Southern Construction Company, their assigns or bearer, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas, the sum of Thirty ($30.00) Dollars, the same being six months interest due that day on City of Gainesville, Texas, Street Improvement Warrant, Series .... No. .....

dated November 20th, 1919, to which this coupon is attached and is a part thereof.

E. N. Blackburn,
Mayor.

S. A. Bryan,
City Secretary.

Said warrants shall be executed and delivered to the said Southern Construction Company, Contractor, upon completion of their contract in accordance with the terms and provisions thereof, upon certified statement of account, or upon estimates of materials which have been furnished and labor which has been performed and accepted by said City prior to the date of approval of such estimates, such delivery to be made only after inspection of materials furnished and labor performed under said contract, and acceptance of said materials and work by the City Council.

Be It Further Ordained By the City Council that, to pay the interest and create a sinking fund sufficient to retire said warrants at their maturity, a tax of and at the rate of eight (8c) cents on the one hundred dollars' valuation of taxable property in said City of Gainesville, out of the tax of $1.50 on the one hundred dollars' appraised valuation of property in said City levied annually for general purposes and for the purpose of paying interest and providing the sinking fund on the bonded indebtedness and for the maintenance of public schools of said City, as provided in Sec. 1, Art. 3, of the Special Charter of the City of Gainesville, Texas, enacted by the 31st Legislature of Texas,

at its regular session, is hereby levied for the year 1919; that during the year 1920, and each year hereafter while any of said warrants are outstanding and unpaid, and at the time other City taxes are levied in each of said year, there shall be computed and ascertained what rate of tax, based upon the latest approval tax rolls of said City will be necessary, requisite and sufficient to fully make, raise and produce in each of said years, the amount of principal necessary to be raised for that year plus the interest maturing in said year upon the amount of this series of warrants maturing in said year, and for each of said years there is hereby ordered to be levied, assessed and collected, in due time, form and manner a tax at such rate as shall be found necessary as aforesaid, and all of the proceeds from such taxes shall be placed in a separate special fund for this series of warrants, known and designated as "Special Street Improvement Warrant Fund," and the City Treasurer shall not honor any draft upon said fund or pay out any of the same, except in the payment of interest on said warrants or for retiring the same.

The fact that the streets of the City are in a deplorable condition the present severe weather making them almost impassable creates a public emergency and an imperative public necessity that the rule requiring

ordinances to be read at three several meetings be suspended and that this ordinance take effect from and after its passage and it is so ordained.

Passed this the 16th day of December, 1919.

Approved this the 16th day of December, 1919.

E. N. Blackburn,
Mayor, City of Gainesville, Texas.

Attest:

S. A. Bryan,
City Secretary, City of
Gainesville, Texas.

The warrants issued by the City of Gainesville, and purchased by Brown-Crummer Investment Company, were all in the form set forth in the foregoing resolution, and each contained the recitations appearing in said form.

A certified copy of said resolution of December 16, 1919, was attached to the first draft of H. W. Head upon Brown-Crummer Investment Company, dated April 27, 1920, for two thousand eight hundred fifty dollars ($2,-850.00), at the time said draft was presented to Brown-Crummer Investment Company for payment at Wichita, Kansas, and at the time same was paid. Said draft last mentioned covered warrants Numbers One (1) to Three (3) inclusive, and at the time same was paid by Brown-Crummer Investment Company, there was also attached to said draft certified copy of a resolution of the Gainesville City Council, dated April 6, 1920, in terms and language as follows:

"A Resolution.

Auditing and allowing estimate of the Southern Construction Company, for materials furnished and work performed in the construction of street improvements in and for the City of Gainesville, Texas.

City Hall, City of Gainesville, Texas.
April 6th, 1920.

The city council of the City of Gainesville, Texas, met in regular session, in the city hall, in said city, on this, the 6th day of April, 1920, at which meeting the mayor, aldermen, and city secretary were present, when the following proceedings, among others, were had, to-wit:

The mayor offered for consideration and passage a resolution providing for the allowance of estimate or claim of The Southern Construction Company, contractor, for materials furnished and work performed in the construction of certain street improvements in and for the City of Gainesville under its contract with the said Southern Construction Company, of date November 20, 1919.

Moved by Alderman Buckingham, seconded by Alderman Bramble, that the resolution be adopted.

Ayes: Aldermen Thomas, Beck, Bramble, Howell, Lewis, Puckett, Kendall and Buckingham.

Nays: None.

The resolution follows:

Whereas, on the 20th day of November, 1919, the City of Gainesville entered into a contract with the

Southern Construction Company, contractor, for the construction of certain street improvements in and for said city; and,

Whereas, the said Southern Construction Company has furnished materials and performed labor in performance of said contract and in accordance with the plans and specifications attached to said contract and made a part thereof, and for said materials and work the said Southern Construction Company has presented to this council their first estimate and claim covering the cost thereof to the city, which claim and estimate is in words and figures as follows, to-wit:

Estimate No. 1.

*To the City Council of the City of Gainesville, Texas*:

Gentlemen:

I present to you below Estimate No. 1, being claim for materials furnished and work performed under contract with the City of Gainesville, Texas, of date November 20, 1919, for partial cost of construction of street improvements provided for in said contract, to-wit:

| | |
|---|---|
| For Gravel Base, Gutters and Excavation between Haight and Gorham Streets on Dixon Street. . . . . | $3,300.00 |
| Less Ten Per Cent retained. . . . . | 300.00 |
| | 3,000.00 |

Respectfully submitted,

Southern Construction Co.
by Lester Levy,
Contractor.

And, whereas, the materials so furnished and the work performed and covered by said claim has been by this council inspected and accepted by the city to be in accordance with the contract, and the plans and specifications adopted by this council, and determined by this council to be well worth the price agreed to be paid therefor as reflected in said claim and statement of account; and,

Whereas, said claim has been duly audited and found to be correct, and has been approved.

Therefore, be it resolved by the city council of the City of Gainesville, Texas, that the claim of the said Southern Construction Company, covering materials furnished and labor performed in the construction of said street improvements aggregating the sum of $3,000.00 be, and the same is hereby allowed.

That in accordance with the terms and provisions of said contract, and the claim of the said Southern Construction Company presented to this council, there shall be delivered to the said Southern Construction Company, City of Gainesville Street Improvement Warrants, Series A-1, to the amount of $3,000.00, being warrants numbers one (1) to three (3) inclusive, in the denomination of one thousand ($1,000.00) dollars each, dated November 20th, 1919, bearing interest at the rate of six per cent (6%) per annum, authorized to be issued by ordinance duly passed by the city council of said city on the 16th day of December, 1919, and recorded in Book 6, at pages 583, *et seq.*, of the minutes of this council, evidencing the indebtedness due by said city to the said

Southern Construction Company, their assigns or bearer.

That the City of Gainesville has received full value and consideration for the warrants herein authorized to be delivered.

Passed this the 6th day of April, 1920.

Approved this the 7th day of April, 1920.

(Seal) (Signed) E. N. Blackburn,
Mayor, City of Gainesville, Texas.

Attest:

S. A. Bryan,
City Secretary, City of
Gainesville, Texas.

*The State of Texas, County of Cooke.*

I, S. A. Bryan, City Secretary of the City of Gainesville, Texas, hereby certify that the above and foregoing is a true and correct copy of a resolution passed by the city council of the City of Gainesville, Texas, on the 6th day of April, 1920, said resolution appearing of record in Book 7, at pages 38, *et seq.*, of the minutes of said city commission.

Witness my hand and the seal of said city this the 7th day of April, 1920.

(Signed) S. A. Bryan,
City Secretary, City of
(Seal) Gainesville, Texas."

Also attached to said draft at said time was an affidavit and certificate signed by the mayor and aldermen of the City of Gainesville, in terms and language as follows:

"*The State of Texas, County of Cooke.*

Before me, the undersigned authority, on this day personally appeared E. N. Blackburn, mayor, Aldermen Beck, Thomas, Bramble, Buckingham, Nowell, Lewis, Kendall, Puckett and S. A. Bryan, city secretary, who having by me first duly sworn, each on his oath, does state that the statements contained in the resolution passed by the city council on the 6th day of April, 1920, approving estimate presented by the Southern Construction Company, contractor, are true and correct; that the materials so furnished and the work performed and covered by said estimate or claim has been by said council inspected and accepted and found to be in accordance with said contract and plans and specifications, and determined by said council to be well worth the price agreed to be paid therefor, as reflected in said statement of account or estimate, and that the City of Gainesville has received full value for the money represented by said warrants.

Executed at Gainesville, Texas, this the 7th day of April, 1920.

(Signed) E. N. Blackburn,
Mayor.

J. W. Puckett,
Alderman.

.....,
Alderman.

.....,
Alderman.

.....,
Alderman.

.....,
Alderman.

C. M. Buckingham,
Alderman,

W. B. Nowell,
Alderman,

Geo. A. Beck,
Alderman,

Lee Lewis,
Alderman,

J. A. Thomas,
Alderman.

S. A. Bryan,
City Secretary.

Sworn to and subscribed before me, this the 24th day of April, 1920.

(Signed) W. Walker,
(Seal) Notary Public, Cooke County, Texas."

Also attached to said draft at said time was a certificate of W. M. Harris, in terms and language as follows:

"April Twenty Eighth
Nineteen Twenty.

I hereby certify that I have examined a certified copy of the record of the proceedings of the City Council of the City of Gainesville, Texas, passed preliminary to the issue by said city of its Street Improvement Warrants, Series A 1, to the amount of three thousand ($3,000.00) dollars, being warrants numbered one (1) to three (3) inclusive, in the denomination of one thousand ($1,000.00) dollars each, due serially 1921 to 1922, inclusive, of an issue of fifty (50) warrants in the denomination of one thousand ($1,000.00) dollars each, aggregating fifty thousand ($50,000.00) dollars, dated November 20th, 1919, and bearing interest at the rate of six per centum (6%) per annum; and in my opinion, such proceedings show lawful authority for the issue of said warrants numbered one (1) to three (3) inclusive, under the laws of the State of Texas and the city charter of the City of Gainesville, now in force.

I further certify that I have examined warrants numbered one (1) to three (3) inclusive, and find the same to be properly executed and in due form of law; and in my opinion the said issue to the amount of three thousand ($3,000.00) dollars aforesaid, is valid and legally binding upon the said City of Gainesville, and

that all the taxable property in said city is subject to the levy of a tax to pay the same.

Respectfully submitted,

(Signed) W. M. Harris."

The draft of H. W. Head for nine thousand five hundred dollars ($9,500.00), on Brown-Crummer Investment Company, dated September 22, 1920, which was paid by Brown-Crummer Investment Company, covered warrants numbers forty-one (41) to fifty (50) inclusive, and when paid by Brown-Crummer Investment Company at Wichita, Kansas, was accompanied by resolution of the Gainesville City Council, and affidavit and certificate of the Mayor and Aldermen of the City of Gainesville, and approving opinion of W. M. Harris, all in terms and language substantially identical with the resolution of April 6, 1920, and the affidavits and certificates and approving opinion above set forth accompanying the first draft above mentioned, of date April 27, 1920, save and except that the said papers and documents accompanying the draft of September 22, 1920, related to warrants numbers forty-one (41) to fifty (50) inclusive, and the amount of the estimate set forth in the resolution was ten thousand dollars ($10,000.00).

The draft of H. W. Head for sixteen thousand one hundred fifty dollars ($16,150.00), on Brown-Crummer Investment Company, dated October 5, 1920, which was paid by Brown-Crummer Investment Company, covered warrants numbers twenty-four (24) to forty (40)

inclusive, and when paid by Brown-Crummer Investment Company at Wichita, Kansas, was accompanied by resolution of the Gainesville City Council, and affidavit and certificate of the Mayor and Aldermen of the City of Gainesville, and approving opinion of W. M. Harris, all in terms and language substantially identical with the resolution of April 6, 1920, and the affidavits and certificates and approving opinion above set forth accompanying the first draft above mentioned, of date April 27, 1920, save and except that the said papers and documents accompanying the draft of October 5, 1920, related to warrants numbers twenty-four (24) to forty (40) inclusive, and the amount of the estimate set forth in the resolution was seventeen thousand dollars ($17,000.00).

The draft of H. W. Head for nine thousand five hundred dollars ($9,500.00), on Brown-Crummer Investment Company, dated November 5, 1920, which was paid by Brown-Crummer Investment Company, covered warrants numbers fourteen (14) to twenty-three (23) inclusive, and when paid by Brown-Crummer Investment Company at Wichita, Kansas, was accompanied by resolution of the Gainesville City Council, and affidavit and certificate of the Mayor and Aldermen of the City of Gainesville, and approving opinion of W. M. Harris, all in terms and language substantially identical with the resolution of April 6, 1920, and the affidavits and certificates and approving opinion above set forth accompanying the first draft above mentioned, of date April 27, 1920, save and

except that the said papers and documents accompanying the draft of November 5, 1920, related to warrants numbers fourteen (14) to twenty-three (23) inclusive, and the amount of the estimate set forth in the resolution was ten thousand dollars ($10,000.00).

The draft of H. W. Head for nine thousand five hundred dollars ($9,500.00), drawn on Brown-Crummer Investment Company, which was paid by Brown-Crummer Investment Company's check of date January 1, 1921, being said company's check No. 11214, for nine thousand five hundred dollars ($9,500.00), was accompanied by resolution of the Gainesville City Council, and affidavit and certificate of the Mayor and Aldermen of the City of Gainesville, and approving opinion of W. M. Harris, all in terms and language substantially identical with the resolution of April 6, 1920, and the affidavits and certificates and approving opinion above set forth accompanying the first draft above mentioned, of date April 27, 1920, save and except that the said papers and documents accompanying the draft of January 1, 1921, related to warrants numbers four (4) to thirteen (13) inclusive, and the amount of the estimate set forth in the resolution was ten thousand dollars ($10,000.00).

Accompanying and attached to each of said drafts at the time same was paid by Brown-Crummer Investment Company at Wichita, Kansas, were the warrants, with coupons attached, for which said respective drafts were drawn, and said original warrants with coupons attached, were among the papers attached to said

respective drafts at the time same were respectively paid.

Each of the ordinances and resolutions above referred to were regularly passed by the City Council of the City of Gainesville, on the respective dates above set forth.

At the time of paying for the warrants accompanying each of said respective drafts, and in each of said cases, the witness, R. E. Crummer, testified that he examined said warrants and papers before actually paying the draft, and believed the recitations therein contained to be true, and relied upon them. The warrants and coupons now owned by Brown-Crummer Investment Company, are as follows:

"EXHIBIT A."

| | |
|---|---|
| Warrant No. 7, due March 1, 1924, | $1,000.00 |
| Warrant No. 8, due March 1, 1924, | 1,000.00 |
| Coupon No. 9, detached from warrants Nos. 7 to 50, 44 at $30.00 each, due March 1, 1924. . . . . | 1,320.00 |
| Coupon No. 10, detached from warrants Nos. 9 to 50, 42 at $30.00 each, due September 1, 1924. . . . . | 1,260.00 |
| Coupon No. 11, detached from warrants Nos. 9 to 50, 42 at $30.00 each, due March 1, 1925. . . . . | 1,260.00 |
| Warrant No. 9, due March 1, 1925, | 1,000.00 |
| Warrant No. 10, due March 1, 1925, | 1,000.00 |
| Warrants 11 and 12, due March 1, 1925, | 2,000.00 |
| Coupon No. 12, detached from warrants Nos. 11 to 50, 40 at $30.00 each, due September 1, 1925 . . . . . | 1,200.00 |

Coupon No. 13, detached from warrants Nos. 11 to 50, 40 at $30.00 each, due March 1, 1926. . . . . 1,200.00"

On September 27, 1920, Brown-Crummer Investment Company, through R. E. Crummer, its vice president, wrote to Harris & Graham, attorneys at Dallas, Texas, as follows:

"September 27, 1920.

Harris & Graham, Attorneys,
Dallas, Texas.

Gentlemen:

"Acknowledging receipt of your favor of the 23rd inst., we are pleased to note the shipment of the $10,000.00 City of Gainesville, Texas, Street Improvement Warrants, which we assume will be presented to us for payment through the American State Bank of this City at an early date, and payment therefor will be made promptly in accordance with the terms of our contract of purchase.

"We believe our Mr. Moore suggested to either you or Mr. Blaine that if it was practical to arrange for the delivery of this entire issue to the American State Bank of this City at one time upon the understanding that the various installments would be approved and released to us only as the estimates were allowed, that it would be of quite an assistance to us in securing and holding our commitments on this issue, the delivery of which has already been delayed so long that some of our prospective purchasers have

practically dismissed the subject from their minds. We can assure you that any assistance you may be able to render us to accomplish this end will be greatly appreciated.

"We wrote you a few days ago regarding any authority that may exist to permit Texas Counties to vote a refunding bond issue to retire outstanding warrants issued for Court House purposes. We presume that any authority that might permit this procedure would also apply to other characters of indebtedness.

"We have particularly in mind at this time the Archer County Texas Road & Bridge Warrants recently issued to the Texas Bridge Company, and would be particularly interested in knowing whether or not any proceedings can be directed whereby this county will be able to vote bonds for the purpose of refunding this indebtedness.

"According to your request, we are handing you herewith check for $30.00 covering your services to date in connection with the Gainesville Warrants.

"With best regards, beg to remain,

Yours very truly,

.....

REC/P Vice-President."

W. M. Harris heretofore mentioned was a member of the firm of Harris & Graham.

On October 1, 1920, Harrison & Graham, through W. M. Harris, wrote S. A. Bryan, City Secretary of the City of Gainesville, as follows:

"October 1st, 1920.

Mr. S. A. Bryan, City Secretary,
Gainesville, Texas.

Dear Sir:

"We have an inquiry from the Brown-Crummer Company of Wichita, Kansas, who are the purchasers of the warrants of your City, suggesting that an arrangement be made with your City for the delivery of all of the remaining warrants, to the American State Bank of Wichita, upon the understanding that the various installments will be approved and released to them as the estimates of the Contractor are allowed, stating that such an arrangement would be quite an assistance to them in securing and holding their commitments on this issue of warrants.

"It occurs to the writer that your City can well afford to do this for the reason that the purchasers have sustained a loss on the purchase of this series of warrants, and that the City can afford to assist them to this extent, in order to enable them to hold commitments already made.

"Of course, this would necessitate the execution of all of these warrants by the Mayor, yourself and the City Treasurer and forwarding them to the American State Bank of Wichita, Kansas, with instructions to deliver them in installments as authorized by resolution of the City Council of your city. If such an arrangement is satisfactory, please advise me and at the same time have the warrants properly signed by

the City officers and sealed with the City seal and forward same as above directed.

Yours very truly,

(Signed) Harris & Graham,
WMH/AMR By W. M. H."

On October 12, 1920, Brown-Crummer Investment Company, through R. E. Crummer, its vice president, wrote to the City Treasurer of the City of Gainesville, as follows:

"October 12, 1920.

City Treasurer,
Gainesville, Texas.

Gentlemen:

"We have today had presented to us $17,000.00 City of Gainesville Texas Street Improvement 6% Warrants, being the third installment delivered to the Southern Construction Company.

"We note, however, coupons aggregating $793.39 have been detached, which together with the 8% additional underwriting, makes a total of $1643.39 for which amount you will kindly remit us your check and promptly upon receipt of same, the draft of the Southern Construction Company will be honored.

"It is our understanding that arrangements would be made with you whereby the entire issue of warrants could be executed and delivered to our bank to be released to us at such times and in such amounts as the estimates are hereafter allowed. On account of the long delay in the closing of this transaction, it

would be very helpful to us in the sale of these securities to have this arrangement carried out if possible.

"Kindly let us hear from you by early mail, regarding the above, and greatly oblige,

Yours very truly,

(Signed)

.....,

REG/P Vice-President."

On October 30, 1920, Brown-Crummer Investment Company, through R. E. Crummer, its Vice-President, wrote to the Merchants & Planters National Bank of Sherman, Texas, attention H. W. Head, as follows:

"October 30, 1920.

Merchants & Planters National Bank,
Sherman, Texas.

Attention H. W. Head.

Gentlemen:

"We have your favor of the 27th inst. advising shipment of the $20,000.00 City of Gainesville Texas Improvement Warrants to the American State Bank of this City, which shall be taken up according to the terms of our contract as and when the various installments are due the contractor which you will appreciate must be evidenced by proper legal proceedings.

"We assume your letter of instructions to the American State Bank, in which it is stated that $10,000.00 are to be taken up not later than November 5th, and the remaining $10,000.00 not later than November 25th, is contingent upon the contractor

having received estimates within the times stated and are supplying us with this evidence.

"Any drafts drawn against us should be accompanied with complete legal papers which the Southern Construction Company have heretofore furnished us, covering the various installments, including final approving opinion of Judge Harris.

Yours very truly,

....,
Vice-President."

REC/P

The witness, R. E. Crummer, testified that pursuant to the letters above mentioned, the warrants were escrowed in the bank at Sherman, and subsequently escrowed in the bank at Wichita, Kansas, pursuant to the times stated in said letters.

Referring to that portion of the foregoing bill of exception, wherein it is recited that the witness, R. E. Crummer, testified: "Relying upon our attorneys advise, and these papers, I assumed that the city did have authority to issue the warrants without the engineer having made an estimate and certifying to it."

The following is substituted in lieu of said quotation: The following question was asked of said witness, and the following answer made by him:

"Q. Didn't you know the city had no authority to issue a warrant unless the engineer had made an estimate and certified to it?

A. Relying upon our attorneys advice, and these papers, I assumed they did have the authority."

In order that all the matters aforesaid may be made of record, I, W. L. Estes, District Judge, before whom said cause was tried, do hereby at the instance and request of the defendant Brown Crummer Co., sign and seal the foregoing additions and qualifications to the attached bill of exception, on this, the 28 day of June, 1926, the same as if said additions and qualifications were fully written into said bill of exception, and the same are here now made a part of said bill of exception.

W. L. Estes,
*Judge of the United States District Court, for the Eastern District of Texas.*

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co., et al. Bill of Exception. Filed June 28, 1926. F. A. King, Clerk. By J. R. Blades, Deputy.

## Assignments of Error.

*In the District Court of the United States for the Eastern District of Texas, sitting at Sherman in said District.*

*No.* 241 *at Law.*

*City of Gainesville,*

vs.

*Southern Construction Co., et al.*

Now comes the City of Gainesville, plaintiff in error in the above numbered and entitled cause and

in connection with its petition for writ of error assigns the following errors which plaintiff in error avers occurred on the trial thereof, and upon which it relies to reverse the judgment rendered herein as appears of record.

1.

The court erred in refusing to give the first instruction requested by the plaintiff as follows:

"The treasury warrants issued by the City of Gainesville to the Southern Construction Company described in the pleadings are void and of no validity, because issued without the consent of the qualified voters of the city of Gainesville granted at an election held for that purpose."

2.

The court erred in refusing to give the second instruction requested by the plaintiff as follows:

"The contract between the City of Gainesville and the Southern Construction Company and all proceedings thereunder are void, because said contract, among other things, was made without any preliminary estimate of the cost of the proposed street improvement as prescribed by the charter and the statute."

3.

The court erred in refusing to give the third instruction requested by the plaintiff as follows:

"Under Sec. 28, Art. 2 of the Charter of the City of Gainesville contracts are required to be let to the

lowest responsible bidder, after the adoption of specifications and the giving of notice. The contract in question having been changed in material respects after the bids were received, without being re-opened to competitive bidding as changed, is void."

4.

The court erred in refusing to give the fourth instruction requested by the plaintiff as follows:

"The warrants issued by the City of Gainesville to the Southern Construction Company are not negotiable instruments, and anyone acquiring such warrants takes subject to any defense that the city would have against them in the hands of the original holder."

5.

The court erred in refusing to give the fifth instruction requested by the plaintiff as follows:

"Under the charter of the City of Gainesville in respect to street improvement the city could not pay for the paving of streets by the issuance of long-time warrants; but if without funds to pay for such improvement, the money therefor could only be raised by the issuance of bonds pursuant to the consent of the qualified voters granted at an election held for that purpose; and that not having been done in this case the contract and the warrants issued pursuant thereto are illegal and void."

6.

The court erred in refusing to give the sixth instruction requested by the plaintiff as follows:

"The instructions to bidders and the specifications and contract in question required that the contractor in the employment of labor should give preference to the citizens of Gainesville; and in default of citizens of Gainesville, to citizens of the State of Texas. These provisions were illegal and interfered with fair competition and rendered the contract and all proceedings thereunder void."

7.

The court erred in refusing to give the seventh instruction requested by the plaintiff as follows:

"The unquestioned proof shows that the City of Gainesville received no consideration for $15263.73 of the series of $50000.00 of warrants issued by it, and that said excess of warrants over the amount of paving done are without consideration and uncollectable."

8.

The court erred in refusing to give the eighth instruction requested by the plaintiff as follows:

"In the acquisition of warrants notice to the agent is notice to the principal, and if J. E. Blaine knew that the warrants in question were issued before the paving, as to which each set of warrants applied, was done and were issued when nothing was due under the contract, then the Brown-Crummer Company is in no better position than the Southern Construction Company, and the Brown-Crummer Company acquired such bonds, if at all, subject to all

the defenses the City of Gainesville had against them."

9.

The court erred in refusing to give the ninth instruction requested by the plaintiff as follows:

"If J. E. Blaine was the agent of Brown-Crummer Company in the purchase of the warrants in question and during said agency and before Brown-Crummer Company received the warrants and paid therefor said Blaine knew that they were issued for paving not done and in advance of the performance and acceptance of the work, then the Brown-Crummer Company acquired such warrants subject to all the defenses the City of Gainesville had against the same."

10.

The court erred in refusing to give the tenth instruction requested by the plaintiff as follows:

"If the evidence shows that J. E. Blaine was the agent of Brown-Crummer Company, you are then instructed that the knowledge of Blaine would be the knowledge of the Brown-Crummer Company. You are further instructed that in order for Blaine to have been the agent of Brown-Crummer Company it was not necessary for him, at the time of the transactions, to have been in their employ, receiving a salary, but if they entrusted him with the handling of the transactions with regard to the warrants and the purchase of the same, and carrying out these transactions,

then you are instructed that this was sufficient to constitute him an agent."

**11.**

The court erred in refusing to give the eleventh instruction requested by the plaintiff as follows:

"It appears from the evidence that Mr. Harris was the attorney for Brown-Crummer Company in preparing sundry papers in the case, by virtue of which certain ordinances were passed and the warrants issued; you are instructed that the knowledge of Mr. Harris was the same as the knowledge of Brown-Crummer Company."

**12.**

The court erred in refusing to give the twelfth instruction requested by the plaintiff as follows:

"The contract for the paving and the ordinances under which it was made prescribed that the abutting lot owner shall pay for three-fourths of the cost of the improvement in front of his property, in three annual installments, bearing interest at the rate of eight per cent per annum, while the charter required that the abutting lot owner should pay for only two-thirds of the cost of improvement in front of his property, and that the assessments therefor should be payable in equal annual installments, not less than five in number; the failure of the contract and ordinances to comply with the charter in these respects renders the contract and all proceedings thereunder void."

13.

The court erred in refusing to give the following instruction requested by the plaintiff:

The contract between the City of Gainesville and the Southern Construction Co. is void because the unquestioned proof shows that the contract was awarded within less than forty-eight hours after the bids were opened.

14.

R. E. Crummer, being an interested party, the jury were the sole judges of his credibility and did not have to accept his evidence as true and the court therefore erred in instructing a verdict in favor of the Brown-Crummer Investment Company based solely upon the testimony of said Crummer.

15.

The warrants in question not being negotiable instruments, the court erred in assuming that the Brown-Crummer Investment Co. was a *bona fide* holder entitled to the protection accorded to *bona fide* holders of negotiable paper, and therefore erred in instructing a verdict in favor of said company.

16.

W. M. Harris, being the agent of the Brown Crummer Investment Co. to furnish the proceedings in reference to the issuance of the warrants, and to see that everything was in proper shape, notice to him was the same as notice to the Brown-Crummer Investment Co. and the court therefore erred in instructing a verdict in favor of said company.

17.

J. E. Blaine being unquestionably the agent of the Brown-Crummer Investment Co. in the purchase of the warrants in question and there being abundant evidence tending to show that said Blaine knew that the warrants were issued before the acceptance or performance of the work, and that the recitals in the resolution for their issuance were false, the court erred in instructing a verdict in favor of the Brown-Crummer Investment Company.

18.

The unquestioned proof showing that the City of Gainesville lacked something over $15000.00 of receiving the paving that should have been constructed to entitle the Southern Surety Co. to the $47000.00 of warrants and there being no proof showing or tending to show that H. W. Head paid out upon orders approved by the Mayor of Gainesville sums of money aggregating $47000.00 the court erred in instructing a verdict in favor of the defendant Head and the Southern Surety Co.

19.

There being no proof that H. W. Head paid out any sums of money upon orders approved by the Mayor of Gainesville, the court erred in instructing a verdict in favor of his executor.

20.

The warrants sued on being the last issued, the plaintiff received no consideration therefor or the consideration has wholly failed, therefore the court

erred in directing a verdict against the plaintiff on said warrants.

21.

The court in directing a verdict in favor of the Brown-Crummer Investment Co. deprived the plaintiff of its right of trial by jury guaranteed by the seventh amendment to the Constitution of the United States.

Respectfully submitted,

CECIL MURPHY,
W. O. DAVIS,
*Attorneys for Plaintiff, the City of Gainesville.*

Endorsed:

No. 241 Law. The City of Gainesville vs. Southern Construction Co. et al. Assignments of Error. Filed June 28th, 1926. F. A. King, Clerk, U. S. District Court. By.....deputy.

**Petition for Writ of Error and Order Thereon Fixing Amount of Bond.**

*In the District Court of the United States for the Eastern District of Texas, sitting at Sherman.*

*No. 241 at Law.*

*City of Gainesville,*

vs.

*Southern Construction Co., et al.*

*To the Hon. W. Lee Estes, Judge of the District Court aforesaid.*

Now comes the City of Gainesville, a Texas municipal corporation by attorney and respectfully shows

that on the 20th day of May, A. D. 1926, the court directed a verdict against your petitioner, and in favor of Brown-Crummer Investment Co., Southern Surety Co and H. O. Head, executor, and upon said verdict a final judgment was entered on the 20th day of May, A. D. 1926, against your petitioner.

Your petitioner, feeling itself aggrieved by the said verdict and judgment entered thereon as aforesaid, herewith petitions the court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit under the laws of the United States in such cases made and provided

Wherefore, premises considered, your petitioner prays that a writ of error do issue in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at Fort Worth in said circuit for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

CECIL MURPHY,
W. O. DAVIS,
*Attorneys for Petitioner in Error.*

At Texarkana, June 28, 1926. Petition granted a writ of error allowed supersedeas bond fixed at thirty thousand dollars.

W. L. Estes, *Judge.*

Endorsed:

No. 241. The City of Gainesville vs. Southern Construction Co. et al. Petition for Writ of Error. Filed June 28th, 1926. F. A. King, Clerk U. S. District Court. By ..... deputy.

**Writ of Error Bond.**

*Know all men by these presents:*

That we City of Gainesville, Texas, a municipal corporation as principal, and H. F. Smith, G. W. Brown, J. B. Tanner, Ed Nelson, and A. M. Bell, as sureties, are held and firmly unto Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor of H. W. Head in the full and just sum of thirty thousand ($30000.00) dollars, to be paid to the said Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 28th day of June, in the year of our Lord one thousand nine hundred and twenty-six.

Whereas, lately at a session of the United States District Court for the Eastern District of Texas, at Sherman, in a suit No. 241, pending in said court,

between the City of Gainesville and Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor defendants, a judgment was rendered against the said City of Gainesville and the said City of Gainesville having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be holden at Fort Worth, Texas, in said circuit, in not exceeding thirty days from the 21st day of June, 1926.

Now, the condition of the above obligation is such, that if the said City of Gainesville shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

City of Gainesville,
By J. Z. Keel, Mayor
H. F. Smith (Seal)
G. W. Brown (Seal)
J. B. Tanner (Seal)
Ed Nelson
A. M. Bell.

Sealed and delivered in presence of:

W. O. Davis.

Approved 6/28/26
W. L. Estes,
*United States District Judge.*

*The State of Texas, County of Cooke.*

I, Tom J. Midkiff, Clerk of the District Court for Cooke County, Texas, do certify that I am acquainted with H. F. Smith, G. W. Brown, J. B. Tanner, Ed Nelson and A. M. Bell, whose genuine signatures appear to the attached bond and that each of said sureties is solvent and responsible and that said sureties own unencumbered property subject to execution much exceeding the amount of said bond.

Given under my hand and seal of office, this the 21st day of June, 1926.

(Seal) Tom J. Midkiff,
Clerk of the District Court for
Cooke County, Texas.

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co. et al. Bond. Filed 28th day of June A. D., 1926. F. A. King, Clerk. By ..... deputy.

**Writ of Error.**

*United States of America.*

*Fifth Judicial Circuit.*

*The President of the United States:*

*To the Honorable, the Judge of the District Court of the United States for the Eastern District of Texas, Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between City of

Gainesville, a Texas municipal corporation plaintiff in error, and Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor defendants in error a manifest error hath happened, to the great damage of the said City of Gainesville plaintiff in error as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the said United States Circuit Court of Appeals for the Fifth Circuit, togetner with this writ, so that you have the same at Forth Worth, Texas, in said circuit, not exceeding thirty days from the.....day of June 1926, being the date of issuance of the citation herein, in the United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable W. H. Taft, Chief Justice of the United States, this 28th day of June in the year of our Lord one thousand nine hundred and twenty-six.

F. A. King,
Clerk of the District Court, of the United States for the Eastern District of Texas.
By . . .....Deputy.

Approved by
W. L. Estes, *Judge.*

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error this 28th day of June, 1926.

F. A. King, Clerk.

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co., et al. Writ of Error. Filed 28th day of June A. D., 1926. F. A. King, Clerk. By ..... Deputy.

**Citation in Error.**

*United States of America.*

*Fifth Judicial Circuit, ss.*

*The President of the United States,*

*To Brown-Crummer Investment Co., a corporation, Southern Surety Co., a corporation, and H. O. Head, executor, and Elex F. Wiseberg, F. C. Dillard and John T. Sugg, their attorneys of record, Greeting:*

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be held at the City of Fort Worth, in the State of Texas, in said Circuit, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern District of Texas, wherein the City of Gainesville, a Texas municipal corporation, is plaintiff, and Brown-Crummer Investment Co., Southern Surety Co. and H. O. Head, executor are defendants, to show cause, if any there be, why the judgment rendered

against said the City of Gainesville as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. H. Taft, Chief Justice of the United States, this 28th day of June A. D. 1926, and of the independence of the United States the one hundred and fiftieth year.

W. L. ESTES,
*United States District Judge.*

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co., et al. Citation. Filed 28th day of June A. D., 1926. F. A. King, Clerk. By ....., Deputy.

**Praecipe for Transcript.**

*In the District Court of the United States for the Eastern District of Texas, Sherman Division.*

***No.* 241.**

*City of Gainesville,*

vs.

*Southern Construction Co., et al.*

Mr. F. A. King,
Clerk,

Dear Sir:

Please prepare the record in this case for the Circuit Court of Appeals. You know better than I do the order in which they should be placed, but the following papers should be included in the record:

1. Plaintiff's third amended original petition, filed April 13, 1926.

2. The amended answer of defendant Head, filed May 17, 1926.

3. The first amended answer of Brown-Crummer Investment Company, filed May 17, 1926.

4. The second amended original answer of the Southern Surety Co., filed May 17, 1926.

5. Plaintiff's first amended supplemental petition, filed May 17, 1926.

5½. Defendant Head's supplemental answer, filed May 17, 1926.

6. The agreement and stipulation of the parties, filed June 28, 1926.

7. The verdict of the jury returned May 20, 1926.

8. The judgment of the court rendered May 20, 1926.

9. The bill of exception and addenda thereto, filed June 28, 1926.

10. The petition for writ of error, filed June 28, 1926; and the order endorsed thereon allowing the same.

11. The writ of error.

12. The writ of error bond.

13. The citation in error.

14. The assignment of error.

W. O. DAVIS,
*Attorney for Plaintiff.*

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co. et al. Praecipe for Transcript. Filed June 28, 1926. F. A. King, Clerk by J. R. Blades, Deputy.

**Clerk's Certificate.**

I, F. A. King, clerk of the United States District Court for the Eastern District of Texas, in the Fifth Circuit and district aforesaid, do hereby certify that the foregoing is a full, true and correct transcript of record, bill of exceptions, assignments of error, and all the proceedings in cause No. 241, at law, wherein The City of Gainesville is plaintiff, and the Southern Construction Company, et al., are defendants, as fully as the same remains on file and of record in my office at Sherman, Texas, and that the same constitutes the return to the annexed writ of error and citation in error.

Witness my hand officially, and the seal of the court, at Sherman, Texas, this the 8th day of July, A. D. 1926.

F. A. King, Clerk,
By J. R. Blades, Deputy.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation,

versus

BROWN-CRUMMER INVESTMENT COMPANY et als.

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 9th, 1926

On this day this cause was called, and, after argument by W. O. Davis, Esq., for plaintiff in error, and Alex F. Weisberg, Esq., and F. C. Dillard, Esq., for defendants in error, was submitted to the Court.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation, Plaintiff in Error,

vs.

BROWN-CRUMMER INVESTMENT COMPANY et als., Defendants in Error

Error to the District Court of the United States for the Eastern District of Texas

W. O. Davis (Cecil Murphy on the brief) for Plaintiff in Error.

Alex F. Weisberg (Elcock & Martin; Thompson, Knight, Baker and Harris on the brief), for Defendant in Error, Brown-Crummer Investment Company.

F. C. Dillard (Head, Dillard, Smith, Maxey & Head on the brief) for Defendant in Error, H. O. Head, executor.

John T. Suggs, for Defendant in Error, Southern Surety Co.

Before Walker, Bryan, and Foster, Circuit Judges

OPINION OF THE COURT—Filed July 6th, 1927

FOSTER, Circuit Judge:

The pleadings in this case are too voluminous to be briefly stated. The record is not as clear as it might be but the case shown without serious dispute may be summarized as follows.

In November, 1919, the City of Gainesville, Texas, hereafter referred to as the City, entered into a contract with the Southern Construction Company, hereafter called the Contractor, a partnership composed of Harry D. Levy and Lester Levy, for certain paving and other street improvements. The contract contemplated the City's paying for a portion of the general paving and entirely for the intersections, the City's share being estimated at $50,000.

After some preliminary and supplemental agreements this final result was arrived at. The Contractor agreed to accept warrants, at 5 per cent discount, in amounts of $1,000, maturing March 1, 1921 to March 1, 1940, with interest at 6 per cent, payable semi-annually and evidenced by coupons attached.

The Brown-Crummer Investment Company, hereafter called the buyer, agreed to purchase these warrants when issued and further agreed to print them and to furnish legal advice to the City and supervision of the necessary ordinances, for a further discount of 5 per cent. The warrants up to $47,000 were printed and delivered to H. W. Head, who was in some way interested in the contract, in escrow, and he agreed to indemnify the City on the contract up to $50,000, and furnished the Southern Surety Company, hereafter called the Surety Company, as guarantor for his undertaking.

From time to time as the work progressed the city council adopted ordinances purporting to approve estimates of the engineers covering the work completed, retaining 10 per cent and authorizing the issuance of warrants to

cover same. Head drew drafts on the buyer with the warrants and certified copies of the ordinances attached, and these drafts were paid. Six of the warrants have been paid by the City and the City also from time to time remitted the additional 5 per cent discount to the buyer. The warrants were in form as follows:

Number —, $1,000.00

"UNITED STATES OF AMERICA,
"State of Texas, County of Cook:

"City of Gainesville Street Improvement Warrant, Series A 1

"This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to the Southern Construction Company, Contractor, their assigns or bearer, on the first day of March, 1921, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas, One Thousand Dollars in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the first day of March, 192- and semi-annually thereafter on September 1st and March 1st of each year and the City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest thereon, evidenced by coupons attached hereto principal and interest payable at the place above named upon presentation and surrender of warrant or proper coupon.

"This Warrant is one of a series of Fifty (50) warrants, numbered consecutively from One (1) to Fifty (50) inclusive, in the denomination of One Thousand Dollars ($1,000.00) each aggregating the sum of Fifty Thousand Dollars ($50,000.00), issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to the Southern Construction Company, their assigns or bearer, for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20th, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and Laws of the State of Texas, and

pursuant to an ordinance passed by the City Council of said City of Gainesville, Texas, on the 16th day of December, 1919, recorded in Book 6, at page 583, et seq. of the Minutes of said City Council.

"The date of this warrant, in conformity with the ordinance above mentioned, is November 20th, 1919.

"And It Is Hereby Certified and Recited that all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation.

"In Witness Whereof, the City of Gainesville has caused this corporate seal of said City to be hereto affixed and this warrant to be signed by its Mayor and countersigned by its City Secretary, and registered by the City Treasurer as of the date last above written.

"E. N. Blackburn, Mayor City of Gainesville, Texas.

"Countersigned: S. A. Bryan, City Secretary, City of Gainesvile, Texas.

"Registered this the 27th day of April, 1920.

"R. R. Hullett, City Treasurer, City of Gainesville."

Before the paving was completed the work on two streets was stopped by an injunction secured by a taxpayer. Thereafter the contractor offered to do paving on other streets but nothing came of this offer. The warrants, however, had all been issued and had been paid for by the buyer. In October, 1921, suit was brought by the City in the District Court of Cook County, Texas, against the contractor, H. W. Head, and the Surety Company, to recover the difference between the warrants issued and the work done, alleged to be about $15,000. The City at that time apparently had no thought of contesting the validity of the warrants and did not include the buyer in the suit. A default judgment was rendered in favor of the City against the contractor for $4,090 and against the other two defendants for $15,000. On appeal this was affirmed as to the contractor and reversed as to Head and the Surety Company by the Court of Civil Appeals for the Sixth Supreme Judi-

cial District, 254 S. W. 223. The reversal was on the ground that the petition showed no cause of action against Head and the Surety Company. The validity of the warrants was not considered.

On the remanding of the case to the District Court the City filed an amended petition making the buyer a party defendant. The buyer removed the case against itself to the United States District Court for the Eastern District of Texas as a separable controversy and a motion to remand was denied. Thereafter, the City recast its pleadings and again made the Surety Company party defendant, and, as H. W. Head had died in the meantime, H. O. Head, his executor, was brought in. The contractor was omitted from the suit. In the petition in the Federal Court the City prayed for a judgment against the buyer declaring the warrants void and for an injunction restraining their sale or other disposal, and prayed for judgment against the other defendants in the sum of $15,264.71. The buyer set up a counterclaim in the answer and prayed for judgment against the City on the warrants and coupons then due and unpaid. Notwithstanding the prayer for equitable relief the case was tried to a jury and at the conclusion of the evidence the Court directed a verdict in favor of the buyer in the amount of $13,125, and rejected the claim of the City against H. O. Head, executor, and the Surety Company. There are numerous errors assigned but those running to the direction of the verdict are the only ones that need be considered.

The case presents an anomaly in pleading and practice, but applying the remedial provisions of section 269 J. C. as amended (40 Stat. 1157) we may consider it on this writ of error. The court was without jurisdiction as between the City and Head, executor, and the Surety Company, as the case had not been removed as to them and there could be no jurisdiction, as between the City and Head, both being citizens of Texas, in any event. But that could not affect the jurisdiction as to the buyer and in view of the result we may dismiss those two defendants from further consideration.

The City contends that the instruments in suit are in fact bonds and not warrants and are void because not issued in conformity with the City charter and the laws of Texas and

also relies upon certain irregularities in the awarding of the contract and the issuing of the warrants.

The charter of the City of Gainesville was granted by a special act of the Texas Legislature, approved March 17, 1909, which act contains the recital that it shall be considered a public law of Texas, and thereafter, within the same year, was adopted by a vote of the people. Under its general powers the City has full authority to contract; to grade, pave and otherwise improve its streets, and to levy annually for general purposes and for paying its bonded indebtedness ad valorem taxes on all real, personal and mixed property within the territorial limits of the City. The charter contains these specific provisions:

"The specification of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this act to grant and bestow upon the inhabitants of the City of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter or by some general law of the state of Texas, or by the provisions of the Constitution of the State of Texas."

"The provisions of this act shall be liberally construed with a view to carry out the purposes of this charter and in case of doubtful construction, it shall be resolved in favor of the city."

Section 1, article 4 of the charter provides that the City shall have the authority by ordinances duly passed to borrow money for permanent improvements, including paving and re-paving of the streets, and may issue bonds for that purpose in amounts not exceeding $150,000 in any one year, subject to approval by the taxpayers at an election held for that purpose if the amount exceeds $2,500; requires that provision be made at the same time to assess and collect annually a sufficient sum to pay the interest on the bonds and to create a sinking fund of at least 2 per cent; that the bonds shall not pay more than 5 per cent interest and shall be invalid if sold for less than par and accrued interest.

The laws of Texas provide for submission to the taxpayers of a proposition for the issuance of bonds by a city;

that bonds can have no validity unless approved by the Attorney General; and that said bonds must be registered by the Comptroller. R. S. 701-709-710.

If the instruments in suit were to be classed as bonds there could be no doubt of their invalidity but they are not to be so considered. It was not contemplated that the warrants should be issued for the purpose of borrowing money. It was the intention of all parties that they should be issued in payment for work actually done in paving and otherwise improving the streets under the general powers of the City and the fact that they were payable in future years would not render them invalid. It is not shown that the City would not have sufficient funds for general purposes for the years in which the warrants fall due, nor that the taxes assessed would exceed the legal limit imposed upon the City. The distinction between bonds and warrants issued by Texas municipal corporations has been repeatedly recognized by the courts of that state. The provisions of the charter and the Texas law as to bonds do not effect the authority of the City to issue warrants to be paid out of current revenue in the future. Lasater vs. Lopez, 217 S. W. 373; City of Tyler vs. Jester & Co., 97 Texas 344; Bridges vs. City of Lampasas, 249 S. W. 1085.

As affecting the validity of the obligations as warrants the City contends that the paving contract and all the proceedings relating thereto are void because estimates of the cost, and plans and specifications for the proposed work, were not approved by the council before advertising for bids; that the contract as let was different from the bid and less burdensome; and that the contract provided that preference be given to citizens of Texas and Gainesville; and that in some instances estimates of the work completed were not in fact made before the ordinances approving them were adopted. Perhaps these irregularities might have been urged by a taxpayer or an unsuccessful bidder in a suit to enjoin the letting of the contract or to prevent the prosecution of the work, on showing fraud or damage to the City, but after the contract was let and the work completed it is doubtful that the City could urge them against the contractor. The City also contends that there was a failure of consideration. It seems to be agreed between the parties that the amount of work not done under the con-

tract amounted to about $15,000. It is difficult to reconcile this with the fact that when the contractor was sued in the state court the recovery was only about $4,000, but assuming that the deficiency in work done was approximately $15,000, still the City had ample security for that amount.

It is unnecessary however to consider the objections to the warrants above made. The City had the capacity to issue and sell the warrants. Recitals in warrants or other evidences of debt issued in payment of the obligations of a city are made for the purpose of inducing the purchase of the instruments and are binding upon the municipality in the absence of fraud or knowledge on the part of the purchaser of facts that show the invalidity of the warrants.

It is true that a Mr. Blaine represented the buyer initially in negotiating the purchase of the warrants and attended some of the meetings of the council and that Mr. Wm. M. Harris, a well known and reputable attorney of Dallas, also represented the buyer in preparing the ordinances for the adoption of the council and supervised to some extent the subsequent proceedings, but it is not shown that either of these men had any knowledge of any irregularities in the letting of the contract or in the doing of the work or the adoption by the council of estimates, and it is shown without contradiction by the testimony of Mr. Crummer, who represented the buyer in the final purchase of the warrants, that he had no knowledge of any of the irregularities now urged and relied entirely on the recitals in the warrants in buying them.

In this case the City is clearly estopped to urge the irregularities above mentioned and the partial failure of consideration, and it is immaterial that the warrants were sold at a discount. City of South Houston vs. Carman, 6 F. (2d) 358; Slayton & Company vs. Panola County, 283 Fed. 330; Scott County vs. Advance Rumley Thresher Co., 288 Fed. 739; Grimes County vs. W. L. Slayton & Co., 262 S. W. 209; Evansville vs. Dennett, 161 U. S. 434; City of Belton vs. Brown-Crummer Investment Co., 17 F. (2d) 70.

From the above the conclusion reached is that reversible error is not shown in the direction of the verdict in favor of Brown-Crummer Investment Company and to that extent the judgment is affirmed. The case is remanded with

instructions to dismiss the proceedings as between the City and Head, executor, and the Surety Company. And for such other proceedings as may be necessary, not inconsistent with this opinion.

Affirmed in part, reversed in part.

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JUDGMENT

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation,

versus

BROWN-CRUMMER INVESTMENT COMPANY, et als.

Extract from the Minutes of July 6th, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be and the same is hereby, affirmed to the extent of the direction of the verdict in favor of Brown-Crummer Investment Company, and that said cause be, and the same is hereby remanded to the said District Court with instructions to dismiss the proceedings as between the City of Gainesville and H. O. Head, executor, and the Southern Surety Company, and for such other proceedings as may be necessary, not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the plaintiff in error, City of Gainesville, a Texas Municipal Corporation, and the sureties on the writ of error bond herein, H. F. Smith, G. W. Brown, J. B. Tanner, Ed Nelson and A. M. Bell, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

MOTION AND ORDER STAYING MANDATE—Filed July 15th, 1927

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4861

CITY OF GAINESVILLE, Plaintiff in Error,

vs.

BROWN-CRUMMER INVESTMENT COMPANY et al., Defendant in Error

## Application for Stay

To the judges of said Court:

The City of Gainesville, plaintiff in error, respectfully alleges that it will endeavor to have this cause removed to the Supreme Court of the United States by certiorari and will prepare the petition and other procedure as speedily as possible. The judgment bears interest at the rate of six per cent per annum and is secured by writ of error bonds in more than double the amount of the judgment and no possible injury can result from a stay. Wherefore plaintiff in error prays for an order staying the execution of the judgment for the period of three months from July 6, 1927.

(Signed) Cecil Murphy, W. O. Davis, Attorneys for Plaintiff in Error.

## Order

Considering the foregoing petition, it is ordered that the mandate in this cause be stayed until September 1st, 1927, upon plaintiff in error giving bond in the sum of three thousand ($3,000.00) dollars to afford the plaintiff in error an opportunity to file in the Supreme Court of the United States a petition for a writ of certiorari, and that in the event that said petition be filed within the above time, then it is still further ordered that the mandate in this cause do not issue until the Supreme Court of the United States passed upon said petition for a writ of certiorari.

New Orleans, Louisiana. July 14th, 1927.

(Signed) Rufus E. Foster, U. S. Circuit Judge.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation, Plaintiff in Error,

versus

BROWN-CRUMMER INVESTMENT COMPANY et al., Defendants in Error

BOND ON CERTIORARI—Filed July 25th, 1927

Know all men by these presents:

That we, City of Gainesville, a Texas Municipal Corporation, as principal, and Roy T. Potter and J. W. Gladney, as sureties, are held and firmly bound unto Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor of H. W. Head in the full and just sum of three thousand ($3,000.00) dollars to be paid unto the said Brown-Crummer Investment Co., and various others as stated above, their successors and assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and firmly by these presents.

Sealed with our seals and dated this the — day — July, A. D. 1927.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit, in the above suit pending in the said United States Circuit Court of Appeals, wherein the City of Gainesvile, a Texas Municipal Corporation, was plaintiff in error, and the Brown-Crummer Investment Company, and others, were defendants in error, a decree was rendered against the said City of Gainesville, a Texas Municipal Corporation, and the said plaintiff in error has this the 15th day of July, A. D. 1927, obtained a stay of the mandate of the said United States Circuit Court of Appeals in the above entitled and numbered cause until the first day of September, A. D. 1927, to enable plaintiff in error to apply for and obtain a writ of certiorari from the Supreme Court of the United States to the said United States Circuit Court of Appeals;

Now, therefore, the condition of this obligation is such that if the said City of Gainesville, a Texas Municipal Corporation, fails to make application for such writ on or before September 1st, 1927, or fails to obtain an order granting its application, or fails to make its plea good in the Supreme Court, it shall answer for all damages and costs which the said Brown-Crummer Investment Co., and others, may sustain by reason of the stay, otherwise this obligation shall be null and void.

City of Gainesville, a Texas Municipal Corporation, by (Signed) Frank R. Stanford, Mayor. (Signed) J. W. Gladney, Roy T. Potter, Sureties.

Approved: (Signed) Rufus E. Foster, U. S. Circuit Judge.

THE STATE OF TEXAS,
County of Cooke:

I, Tom J. Midkiff, Clerk of the District Court for Cooke County Texas, do certify that I am well acquainted with Roy T. Potter and J. W. Gladney, the sureties on this bond. They are engaged in the banking business and are solvent and responsible. Each of them owns unencumbered property subject to execution of a value many times exceeding the said bond.

Given under my hand and seal of office, this the 18th day of July, 1927.

(Signed) Tom J. Midkiff, Clerk of the District Court for Cooke County, Texas. (Seal.)

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 286 to 302 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered

4861, wherein the City of Gainesville, a Texas Municipal Corporation, is plaintiff in error, and Brown-Crummer Investment Company et al., are defendants in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 285 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 26th day of July, A. D. 1927.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 31, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1927.**

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## No. 433

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CITY OF GAINESVILLE, PETITIONER,

*vs.*

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR OF H. W. HEAD, RESPONDENTS.

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## PETITION FOR CERTIORARI.

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*To the Supreme Court of the United States:*

Gainesville is a Texas city of exceeding five thousand inhabitants, incorporated under a special act of the legislature of which the courts take judicial notice. The Southern Construction Company, a partnership, hereafter called the Construction Company, did some paving in Gainesville under a contract, by which it was to look to the abutting lot owners for their *pro rata* of the costs, but to accept city treasury warrants at par

for the city's part (140). The statement in the opinion that the warrants were taken by the Construction Company at a discount of 5 per cent is error. The city was to pay 90 per cent of its *pro rata* of the cost as the work progressed, upon estimates approved by the engineer, reserving the remaining 10 per cent until the completion of the work (156). The city's *pro rata* of the contemplated work was supposed to be around $50,000. The Construction Company did paving, the city's part of which was $3,000. This was accepted, the warrants issued, and they have since been paid. Before any other paving was done, warrants for the additional sum of $47,000 were issued, pursuant to resolutions falsely reciting that the paving had been completed, inspected and accepted, when nothing had in fact been done. One of these resolutions passed on the 21st of September, 1920, provided for the issuance of ten $1,000 warrants to the Southern Construction Company, numbered 41 to 50, inclusive (171). Another resolution passed on October 5, 1920, authorized the issuance of seventeen $1,000 warrants to the Construction Company, numbered 34 to 40, inclusive. On November 2, 1920, another resolution was passed directing the issuance of ten $1,000 warrants to the Construction Company, numbered 14 to 23, inclusive (172). Another resolution was passed on November 16, 1920, directing the issuance to the Construction Company of ten $1,000 warrants, numbered 4 to 13, inclusive (172). At the time of the issuance of these warrants the paving which they were intended to represent had not been laid, nor had the ground been broken. There were no

engineers' estimates, nor had anything been inspected, accepted or received. The recitals were untrue.

H. W. Head, on September 10, 1920, executed to the city of Gainesville, his obligation reciting that under an order from the Construction Company any moneys due from the city of Gainesville were to be paid to him, said moneys being payable in warrants, and that he understood it was the purpose of the city council to have issued to the Construction Company $10,000 in warrants, which were to be properly indorsed by the Construction Company and delivered to him. And in the event of any dispute, discrepancy or other contingency arising which might in any way affect the amount of work done or materials furnished by the Construction Company so as in any way to affect the $10,000 warrants, he agreed to protect and indemnify the city up to the sum of $10,000 (12). And further reciting that none of said moneys will be paid or credited to the Construction Company except in such amounts as may be shown to be due under the signature of the mayor of Gainesville, and when such amounts should equal $10,000, then the obligation to be discharged (13). On the 4th of October, 1920, H. W. Head executed to the city of Gainesville an additional obligation, in substance the same as the first, except it contemplated the issuance of $37,000 additional warrants, and bound himself to make good to that amount (15). The Southern Surety Company guaranteed each of the above obligations. After the passage of these resolutions, the Construction Company did no more paving until 1921, when it did paving which was ac-

cepted and received by the city, amounting to $31,735.29, leaving $15,264.71 worth of paving undone. After doing this paving, the Construction Company abandoned the work (183).

The city brought suit in the District Court for Cooke County, Tex., against the Southern Construction Company, H. W. Head and the Southern Surety Company to recover the difference between the paving it had received and the paving it had paid for; and in the same suit prayed for judgment against the Construction Company individually for gravel and materials furnished, and for hire of teams and some other things. Judgment by default was rendered against the three defendants for $15,000, and against the Construction Company for $4,090 (120). This judgment was reversed on appeal as to Head and the Surety Company. Head *vs.* City of Gainesville, 254 S. W., 323. The opinion of the circuit court of appeals is incorrect in saying that the judgment for $15,000 was against only two of the defendants. It was against all of the defendants, and, in addition to that, an individual judgment was rendered against the Construction Company for $4,090, which has never been paid. In the meantime H. W. Head died, and, upon the remand of the case to the State district court, his executor answered, questioning the validity of the warrants, claiming that they were illegal and void. It was then that the city made the Investment Company, the holder of the warrants, a party to the suit, praying that in case the warrants were held to be illegal and void that they be so declared. The city was thus seeking to bind

the Investment Company by the judgment. The Investment Company petitioned for the removal of the case to the District Court of the United States for the Eastern District of Texas, and that court overruled a motion to remand. Afterward the pleadings were recast. The amended petition alleging all the facts relating to the contract, the issuance of the warrants, the shortage in the paving and the obligation of H. W. Head and the Surety Company, and praying for judgment against the Surety Company and H. W. Head's estate for the difference between the paving done and the paving paid for, but asking that if the warrants be invalid they be so adjudged. H. W. Head's estate and the Surety Company alleged the warrants were invalid and the reason why they were invalid. The Investment Company, by cross answer, sought to recover on the warrants then past due and some unpaid interest on the other warrants. The city, in reply to this cross answer, alleged all the facts connected with the transaction and that it received no consideration for $15,-264.71 of the warrants, and that the warrants sued on were the last issued, and asked that if the warrants are held invalid for judgment so declaring, but if valid that it have judgment against Head's estate and the Surety Company for $15,264.71, as the difference between the paving received and the amount of the warrants, with interest. The case being tried before a jury, the court directed a verdict in favor of the Surety Company against the city for $13,125.40, and that the city take nothing as to Head and the Southern Surety Company, and rendered judgment accordingly (227

and 122). The city carried the case by writ of error to United States Circuit Court of Appeals, Fifth Circuit, which court, on July 6, 1927, affirmed the judgment in favor of the Investment Company against the city, but held it had no jurisdiction of the controversy between the city and the estate of H. W. Head and the Southern Surety Company.

The circuit court of appeals was in error in saying that the city retained 10 per cent when it issued the warrants complanied of. It is true the contract required the city to retain 10 per cent, but it did not do so, but issued warrants for the full amount of work the Construction Company was to do, retaining nothing, thus paying in full for the work before it was done (166 to 189).

The opinion says that the warrants in question were delivered to H. W. Head in escrow. The warrants were issued pursuant to resolutions reciting that they were in payment of indebtedness to the Construction Company and directing their delivery to that company. The Construction Company indorsed the warrants and delivered them to H. W. Head, who delivered them to the Investment Company when it paid for them. There was evidently some outside understanding, not shown on the records of the city, contemplating that Head should use the proceeds of the warrants in paying for the work that was to be done, and his obligation was that the city should receive the $47,000 of paving that it had paid for.

The opinion says that assuming the deficiency in the work was approximately $15,000, still the city had

ample security for that amount. The Construction Company was insolvent. The charter, the instruction to bidders and the bid itself required a construction bond in the amount of the contract. The statute required, in addition to this, the usual penal bond conditioned to pay for the work and material. The contract contemplated the expenditure of exceeding $150,000, yet we find the only bond given was in the sum of $5,000 (164). The instructions to bidders (133) and the bid (134) required the Construction Company to execute a bond to maintain the work for five years, but no such bond was given. The United States District Court instructed a verdict in favor of Head and the Surety Company, doubtless upon the ground that the bond was unenforceable. In what way could the circuit court of appeals reach the conclusion that Gainesville had ample security for the $15,264.71?

There is no question but that the pleadings, requested instructions, exceptions to the charge, and specification of error are sufficient to raise the question sought to be reviewed.

## I.

The so-called treasury warrants in question are in fact bonds, and void because the qualified voters of Gainesville did not give their consent to their issuance at an election held for that purpose. Section 1, Article 4, of the charter prohibits the issuance of bonds in excess of $2,500 unless a majority of voters shall give their consent thereto at an election held for that purpose (128). Article 701 of the Revised Statute

says, "The bonds of an incorporated city or town shall never be issued for any purpose unless the proposition for the issuance of such bonds shall have been first submitted to the qualified voters who are property taxpayers of such city or town." This statute overrides the provisions of the charter. City of Beaumont *vs.* Fall, 291 S. W., 202. In the recent case of A. F. Pulte *vs.* J. Z. Keel, Mayor, *et al.*, not yet reported, the Court of Civil Appeals for the Second Texas District held that obligations, in no respect different from the warrants in question, attempted to be issued by the City of Gainesville, were in fact bonds and void, because the tax-paying voters did not give their consent thereto at an election held for that purpose. That holding is directly in conflict with the opinion of the circuit court of appeals in the present case. The charter of the City of Waco is not materially different from that of Gainesville. In Foster *vs.* City of Waco, 255 S. W., 1104, the Texas Supreme Court held that promissory notes executed by the city for land bought for cemetery purposes were void because not authorized at an election held for that purpose.

The form of the warrants in question is given on page 245 of the printed record. It says:

> "This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to The Southern Construction Company, Contractor, their assigns or bearer, on the 1st day of March, 19—, at the offices of The Brown-Crummer Investment Company, Wichita, Kan-

sas, the sum of One Thousand Dollars in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of 6 per cent (6%) per annum, payable on the 1st day of March, 1920, and semi-annually thereafter on September 1st and March 1st of each year; and the City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest payable at the place above named, upon presentation and surrender of warrant or proper coupon."

The direction to the treasurer to pay does not add to or take from the instrument or change its essential character. But for the inhibition against the issuance of bonds, this instrument would doubtless have been called a bond, and the evident purpose was to evade the inhibition against the issuance of bonds.

II.

The removal of the suit to the Federal court upon the petition of the Investment Company, a citizen of Kansas, if removable, carried the entire case, and the circuit court of appeals should not have refused to take jurisdiction of the controversy between the City of Gainesville and the Surety Company and the Head estate. Section 28, J. C., says: "may remove said suit into the District Court of the United States for the proper district." The statute has not been changed since the decision in Barney *vs.* Latham, 103

U. S., 205 and 212. In Hamilton *vs.* Empire Gas and Fuel Company, 297 Fed., 429, it was held that the removal of a separable controversy carried the whole case into Federal court. To the same effect is Cornell *vs.* Smiley, 256 U. S., 341, and Brooks *vs.* Clark, 119 U. S., 502. There seems to be a conflict between the holding of this court and the Circuit Court of Appeals for the Fifth Circuit. If the circuit court of appeals believed it was without jurisdiction of the controversy between the City of Gainesville on the one part and the Surety Company and the Head estate on the other, it should have directed its remand to the State court and not its dismissal.

III.

It is a question whether the paving contract and the proceedings thereunder are void because of the failure of the council to comply with the mandatory provisions of the charter and the statute. The limitation on the power of boards of aldermen to incur indebtedness binding upon the municipality is nowhere more clearly stated than in the opinion of Judge Fields in Zortmann *vs.* San Francisco, 20 Cal., 96; 81 Am. Dec., 96, and note page 107. In Texas these limitations are so fully recognized that a petition against a municipality seeking to enforce a contract is demurable unless it clearly sets forth the facts and circumstances authorizing the contract. American Roads Machinery Co. *vs.* City of Ballinger, 210 S. W., 265. McNeal *vs.* City of Waco, 89 Tex., 83; 13 S. W., 322. Articles 544 to 547 of the Revised Statutes, now Articles 1082 to

1085, inclusive, of the present statutes, were incorporated into the charter of Gainesville (130). It is prescribed in Article 1083 that when a council shall determine to make any street improvement, the council shall cause estimates to be made of the probable costs thereof by the city engineer and by some other officer of the city, or by a committee of three aldermen. This was not done, and rendered the attempted contract void. Frosh *vs.* City of Galveston, 73 Tex., 401; and City of Corsicana *vs.* Kerr, 89 Tex., 461; 35 S. W., 794.

Section 28, Article 2, of the charter prescribes that all contracts pertaining to public improvements involving as much as $250 shall be based upon specifications prepared, submitted to and approved by the mayor and city council, and after such approval, advertisement for the proposed work shall be made, inviting competitive bids for the work to be done (125). No specifications or plans were ever submitted to or approved by the council prior to the building. Section 28 of Article 2 also provides that all bids shall be sealed and shall be opened by the mayor in the presence of a majority of the aldermen, and shall remain on file in the mayor's office, open for public inspection, at least forty-eight hours before any award is made to any competitive bidder (127). This was not done, but the contract was awarded within twenty-four hours after the bids were opened. The instruction to bidders apprised them that a construction bond would be required in the full amount of the contract, and that a bond for the maintenance of the work for five years

would be exacted. The bid of the Construction Company was accepted twenty-four hours after it was opened, leaving off the maintenance bond and the construction bond, and providing, in lieu of the construction bond, the putting up of $5,000 in collateral satisfactory to the council (164). This was done in disregard of Section 29, Article 2, of the charter, saying that the council shall require a good and sufficient construction bond of all contractors, with at least two good and sufficient securities (127); and Article 5160 of the Revised Statute, saying there shall be required of the contractors before commencement of the work the usual penal bond, with the additional obligation that such contractor shall promptly make payment to all persons supplying him or them with labor and material in the prosecution of the work provided for in such contract. The contract and specifications provided that in the construction of the work the contractor should give preference in employment to the citizens of Gainesville, and when such citizens are not available preference should be given citizens of the United States (146). In no matter relating to this contract did the council get within hailing distance of the law.

## IV.

The next contention is that by instructing a verdict in favor of the Investment Company the district judge invaded the province of the jury and denied to the city of Gainesville a right guaranteed by the Seventh Amendment to the Constitution of the United States.

A suit upon city warrants, to which is interposed the defense of want or failure of consideration or of lack of authority to issue the warrants, is a case at law. If by estoppel an invalid warrant can be made binding (Dillon 857), that law cannot aid the Investment Company. The evidence is sufficient to show that the Investment Company kept in touch with the proceedings from the beginning to the end and is the author of the scheme by which invalid warrants were made to appear valid by false recital in ordinances and resolutions. On November 19, 1919, the day the contract was signed, the Investment Company, through its agent, J. E. Blain, contracted to purchase the warrants from the Construction Company at $.95 on the dollar (207). The Construction Company immediately employed Harris, McCall & Graham to look after the proceedings. It should be presumed that Harris, McCall & Graham informed themselves in reference to what had been done, in order to qualify themselves to pass upon its validity. On December 15, 1919, these attorneys, Harris, McCall & Graham, wrote to the city secretary inclosing the form of an ordinance relating to the contract and providing for the issuance of warrants. The attorneys sent two copies and requested the secretary to return one of them properly certified (209). The ordinance was passed without any change. It contains many false recitals, such as an estimate of costs had been made and plans of specifications approved, and that the bids, after being opened, had remained on file for forty-eight hours

before the contract was awarded. In other words, the resolution recited, not what had been done, but what should have been done in order to make the contract valid. The Construction Company had agreed to accept warrants at par, which meant face value and accrued interest. On January 2, 1920, Harris, McCall & Graham wrote to J. E. Blain, the Investment Company's agent, calling his attention to two corrections which they desired made in the ordinance which they had sent and which had been passed and approved on December 16, 1919. They said that they had made the corrections in their copy, and for Blain to see that the same changes were made in the original record (210). The so-called copy that Harris, McCall & Graham had was the original of the ordinance which had been passed. The changes thus made after the ordinance had been passed and approved entitled the Construction Company to the interest accruing from November 20, 1919, until the delivery of the warrants a year afterwards, which interest found its way to the Investment Company. On June 18, 1920, the Investment Company, through its agent, J. E. Blain, secured from the city an agreement by which the city was to pay to it 5 per cent on all warrants issued to the Construction Company, and in which the Investment Company agreed to furnsh the legal proceedings for their issuance to the Southern Construction Company (205).

After this J. E. Blain and Harris, McCall & Graham took charge of the matter and the council did whatever they were requested to do. The fraudulent resolution

for the issuance of the warrants was prepared in Dallas in duplicate, or triplicate, by Harris, McCall & Graham, and were brought to the city council by J. E. Blain, the Investment Company's agent, together with false affidavits already prepared by Harris, McCall & Graham for the aldermen and city officials to make, to the effect that recitals in the resolutions were true (166). Certificates showing that the original was a true copy was already prepared so that the secretary had nothing to do except "sign here." These resolutions were passed at night, and upon most occasions the mayor was absent on account of sickness. On these occasions, upon the adjournment of the council, Blain and Levy, a member of the Construction Company, would carry the resolutions and warrants to the mayor's residence and there have him to sign them (184). Blain knew that the paving had not been done (216). J. E. Blain was not produced as a witness, nor was any member of the firm of Harris, McCall & Graham, or reason shown for their non-production. It is true that R. E. Crummer, the vice-president and active head of the company, testified that he knew nothing except what the warrants and resolutions show, but he was deeply interested in the transaction and in some respects his evidence is shown not to be true. He testified that he did not know what was in the contract between the city and the Construction Company and that he could not say that the expression, "work performed and material furnished," struck him as somewhat peculiar, and that he presumed that

the city officials prepared the resolution (196). On June 17, Blain wired the Investment Company to know "how much more discount we need on Gainesville warrants and to give all suggestions they can" (203). The Investment Company replied, "We should have at least 5 per cent reduction. Call attention to provisions of contract that work should be completed in 180 working days" (203). J. E. Blain continued to act for the Investment Company. As warrants were issued and turned over by Head to the Investment Company, J. E. Blain was on hand to collect from the city the 5 per cent (208). Whenever the Investment Company wanted anything done in reference to the matter, it called upon Blain.

There was no engineer's estimate, but the resolution contained a statement signed by the Construction Company to the effect that the city was indebted to it for work and material to the amount of ten or seventeen thousand dollars, as the case was, but not described more definitely than by the term "work and material."

## V.

The next contention is that there was no separable controversy authorizing the removal to the District Court of the United States, and the Federal court did not acquire jurisdiction. The suit was an action at law by the city against the Construction Company, H. W. Head and the Surety Company to recover money claimed to be due. When Head's executor interposed the defense that the warrants were invalid and of no

value, the city contending that they were valid, made the Investment Company a party defendant in order to bind it by the judgment, under the liberal rules prevailing in Texas. Head's estate and the Surety Company claimed nothing of the Investment Company and the Investment Company claimed nothing of them. The city claimed nothing of the Investment Company except in the event that warrants were held to be illegal, but in that event that they be so declared. In Texas since the beginning, legal and equitable causes of action may be combined, and the parties, whether praying for legal or equitable relief, were entitled to a trial by jury. (Revised Statutes, Art. 2003.) Pleadings need not be consistent, but every party, whether plaintiff or defendant, can assert inconsistent claims in the same petition or answer. Section 28, *J. C.*, says:

> "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district."

## VI.

The holding of the circuit court of appeals in reference to the validity of the warrants is in conflict with the decision of the Texas Court of Civil Appeals in A. F. Pulte *vs.* J. Z. Keel, Mayor, *et al.*, and in con-

flict with the decision of the Texas Supreme Court in the case of Foster *vs.* the City of Waco, 255 S. W., 1104. It is also in conflict with the uniform rule in Texas, and of this Court in Wall *vs.* the County of Monroe, 104 U. S., 74; the Mayor *vs.* Ray, 19 Wallace, 468, to the effect that treasury warrants are not negotiable under the law merchant, and the holder takes subject to any defense which the municipality may have. The holding of the circuit court of appeals to the effect that the entire case was not removed to the Federal court, and that it acquire jurisdiction of nothing except the controversy between the city and the Investment Company, is in conflict with the decisions of this Court and other Federal courts, such as Barney *vs.* Latham, 103 U. S., 205 and 212; Hamilton *vs.* Empire Gas and Fuel Company, 297 Fed., 429; Cornell *vs.* Smiley, 256 U. S., 341; Brooks *vs.* Clark, 119 U. S., 502. The holding of the circuit court of appeals is also in conflict with the decision of the Supreme Court of Texas and with the uniform rule that boards of aldermen have no general authority to bind the city by contract and can only do so at the time and in the manner authorized by law. Frosh *vs.* City of Galveston, 73 Tex., 401; and City of Corsicana *vs.* Kerr, 89 Tex., 461, and 35 S. W., 794, and many other cases. The question is one of general public interest in Texas and in nearly every other State, and if the ruling complained of is law, then there are no restrictions upon the power of boards of aldermen to anticipate and squander the revenue of future years. The

case involves the right of trial by jury, guaranteed by the Seventh Amendment to the Constitution of the United States, for if, in a case like this, where the unquestioned proof shows, or at least is sufficient to justify the conclusion that the scheme to defraud the taxpayers was devised by the purchaser of the warrants and its agents, and that they knew the real facts, then the supposed right of trial by jury is a delusion.

## VII.

Petitioner attaches hereto a transcript of the record in the case, including the proceedings in the circuit court of appeals, and prays that this petition be granted and the cause removed to this Court for correction of the errors complained of.

CECIL MURPHY,
W. O. DAVIS,
*Counsel for Petitioner.*

## ARGUMENT.

A decent regard for the welfare of those who come after demands that if municipal boards be given the right to anticipate and squander the revenue of future years, that such right be hedged with limitations and restrictions as has been done in Texas. Bonds cannot be issued without the consent of the qualified tax-paying voters given at an election held for that purpose. They cannot run for a longer period than forty years or bear interest at a greater rate than 5 per cent or be sold for less than par. They cannot exceed a stated per cent of assessed values. They must be submitted to the attorney general, accompanied by statements of the other indebtedness of the municipality, the annual expenses of municipal government, and assessed values as shown by the tax rolls and the tax rate. To be of any validity, they must be approved by the attorney general and registered in the office of the comptroller. Thus precautions are taken to secure fairness, deliberation and wise action looking to the interest of citizens as well as investors. A sinking fund sufficient to pay the bonds is provided and safeguarded. At the time these restrictions upon bonds were enacted, warrants such as are involved in this suit had never been used. They are a thing of recent years, devised to evade the inhibition against bonds. If they are valid, then there is no limitation as to interest except the statute against usury. There is no limitation as to time except the constitutional requirement of a sinking fund of at least 2 per cent.

There is no limitation as to the amount. The entire revenue of future years can be anticipated and nothing left for other purposes. Can the law be thus nullified by calling a bond a warrant? Any long-time paper to be paid out of the revenue of future years is a bond within the meaning of the statute. This is the effect of the recent decision of the Texas Supreme Court in Foster *vs.* City of Waco, 255 S. W., 674, and of the court of civil appeals in Pulte *vs.* Keel, not yet reported.

The section of the charter in reference to its provisions being liberally construed and doubts solved in its favor does not and cannot do away with the general rule of construction in relation to powers granted to municipalities. Section 53, Art. 3, of the State constitution says the legislature shall not pass any special law regulating the affairs of cities, towns or wards.

Section 5 of Art. 11 of the State constitution, in force at the time of granting this charter, said, "Cities having more than 10,000 inhabitants may have their charters granted or amended by special act of the legislature." Gainesville was incorporated as a city of 10,000. The constitution has since been amended so as to read 5,000, and a self-governing amendment has been adopted. It has been held in Texas that power granted to the legislature to charter a city by a special act does not carry with it the power to incorporate special legislation therein inconsistent with the general law and policy of the State, for that would be special legislation forbidden by the Constitution. In a special act granting a charter, the rules of evidence

cannot be changed, nor can the rules for construing statutes be modified or anything incorporated inconsistent with general law. City of Beaumont *vs.* Fall, 291 S. W., 202. "Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the municipality and the power is denied." City of Brenham *vs.* Brenham Water Company, 67 Tex., 542, cited with approval in Ennis Water Works *vs.* City of Ennis, 233 U. S., 656. Anything contained in the special act changing this rule and making it applicable to a particular city would be special legislation.

The suit was an action at law brought by the city against Head and the Southern Surety Company to recover on a written obligation executed by Head and guaranteed by the Surety Company. Head alleged that the warrants concerning which the obligation was given were illegal, void and of no value, hence the city suffered no damage. The city, still asserting that the warrants were valid, made the Investment Company a party, asking that in case the warrants were ascertained to be invalid that they be so declared or annulled. This was the condition of the record at the time of the removal to the Federal court. There was no controversy between the city and the Investment Company which could be tried in the absence of Head. The city sought to have the Investment Company bound by the result of its suit against Head. If Head and the Southern Surety Company were left in the State court, then nothing was carried to the Federal court that could be there tried, especially before the

final termination of the controversy between the city and Head. This shows that either the case should not have been removed to the Federal court or that the entire case was carried there. In any event, the question is of serious import to litigants in the Fifth Circuit, and a ruling in conflict with the decisions of this court and of other circuit courts of appeals should be reviewed.

In the letting of the paving contract not a single provision of the statute or charter was complied with. Under the decisions of Texas construing the statutory provisions in question, long before this contract was let, the failure to observe statutory requirements in paving contracts render them and the proceedings thereunder void. This has become a settled rule of decision in Texas, and the question is one of vital importance to every municipality in the Fifth Circuit. A decision like the one complained of, to the effect that boards of aldermen can disregard statutory requirements and do as they please with the public business, should not stand, to invite future disregard of the law.

Judge Dillon, Volume II, Section 857, says: "A municipal corporation is not estopped, after a warrant upon its treasury has been issued, to set up the defense of *ultra vires*, or fraud, or want or failure of consideration." This statement of the law cannot be questioned. The recitation of an audit or the statement of the amount, or that it is owing, contained in a warrant does not furnish the basis for an estoppel, for all warrants contain statements of that kind. A recitation in a non-negotiable obligation is not a thing upon which a purchaser can rely. Every I. O. U. con-

tains a representation, but not one upon which the purchaser can rely. Aside from everything else, the city received no consideration for $15,264.71, or at least to that extent the consideration has failed. The estoppel rests alone in the evidence of R. E. Crummer, the vice-president and manager of the Investment Company. It is true he testified that he relied upon the representations contained in the warrants and the resolutions directing their issuance. Mr. Crummer has a pecuniary interest in the transaction. Since the morning of time, interest has discredited and sometimes disqualified a witness. The maxim "*Falsus in uno, falsus in omnibus*" applies here. He said in one place that he had never seen the contract between the city and the Construction Company and knew nothing of its provisions (196). On June 18, 1920, he wired J. E. Blain, calling his attention to some provisions of the contract and showing that he knew its contents (203). When asked concerning the authorship of the resolutions, he said he presumed the city officials prepared them. Yet we find that he agreed to furnish the legal proceedings and that his attorneys, Harris, McCall & Graham, did so. The manner in which these resolutions and false affidavits were prepared at Dallas by Harris, McCall & Graham and brought to Gainesville and presented to the council by J. E. Blain is fully explained on page 193 of the record. J. E. Blain was the agent of the Investment Company, representing it in the purchase of the warrants. Notice to the agent is notice to the buyer. There could be no question that J. E. Blain knew that the paving had not been done. Notice to the attorney of the buyer is

notice to the buyer. Harris, McCall & Graham evidently knew that the paving had not been done at the time of the issuance of the warrants and that the warrants were being illegally issued. If J. E. Blain and Harris, McCall & Graham did not know the real facts, why were they not produced as witnesses? The failure of the Investment Company to produce its agent and attorneys, through whom it acquired the warrants, gives rise to an unfavorable presumption. The changes made by Harris, McCall & Graham in an ordinance after it had been enacted and approved indicates that they were indifferent as to the real facts provided everything was fair upon its face. The Investment Company was not expecting to hold the warrants, but to sell. It was supposed the buyer would be, they thought, protected by the recitals and affidavits. A city cannot be estopped by an affidavit made by one of its aldermen, for it is not part of his duties to make an affidavit. When a thing is overdone, it gives just ground for suspicion. If the paving had been done and the money was due, affidavits would not have been thought of. In other words, the estoppel was sought to be created by the parties who knew that the recitals were false and the money was not due. The Investment Company wrote suggesting that, in advance of the work, the warrants should be issued and placed in the bank at Wichita, Kans. When we bear in mind that warrant cannot be issued until the claim is audited and allowed, it is evident that the Investment Company knew that false recitals would be necessary to give to the proceedings the appearance of validity.

Anything is a fraud where a false recital has to be spread upon the records to create the appearance of validity. The opinion cites W. L. Slayton & Co. *vs.* Panola County, 283 Fed., 330. In that case one J. L. Arlitt combined with the county commissioners and others to defraud the county, and caused renewal warrants to be issued to Arlitt for $160,000 when nothing was due. These warrants were issued in lieu of warrants which never existed. Arlitt sold the warrants to Slayton & Co. for $159,000; $15,000 of this money never reached the county treasury, but was doubtless paid to Arlitt and others for perpetrating the fraud. The warrants, in any event, could have been defeated in the hands of Arlitt, for he originated the scheme. If the resolutions had been prepared by the city officials, the names of the aldermen and the date of the session would not have been left blank, nor would a carbon copy have been used instead of the original. The resolutions were prepared by someone who did not know the names of the aldermen nor the time of the session. This was all shown on the face of the papers that Crummer had, and he had had enough correspondence with Harris, McCall & Graham to be familiar with their typewriter.

The warrants in question are in the hands of the Investment Company, whose agents originated the scheme, prepared the papers and endeavored to make everything appear fair upon the records, when it was well known that the paving had not been done and nothing was due. The Investment Company, by way of discount and interest earned before they acquired the warrants, received $8,000 for this job, while Arlitt

received $15,000 for his job. That case is certainly not to be commended.

There are some other cases cited in the opinion where similar frauds were perpetrated. In some of them Arlitt figured and in others Crummer. These cases indicate that they are men engaged in the business of framing estoppels and teaching aldermen and county commissioners how to evade the law.

Mr. Crummer's testimony was discredited in many respects. The evidence shows that the agent and attorneys of the Investment Company knew that the work had not been done and a fraud was being perpetrated. The Investment Company was afraid to produce its agent and attorneys, for they would be forced to admit that the warrants were for paving that had never been done. A warrant cannot be issued except for work really done. The city of Gainesville was entitled to have the issue submitted to the jury. Neither the district court nor the circuit court of appeals can, under the Constitution, deprive the city of that right.

The suit had been pending for years. Mr. Crummer, if he did not already know, had time to investigate, and doubtless did investigate. Yet he failed to produce his agent and attorneys and presumed that the city officials prepared the resolutions. A jury did not have to believe him.

Respectfully submitted,

CECIL MURPHY,
W. O. DAVIS,
*Counsel for Petitioner.*

FILED
FEB 7 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

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# No. 433

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CITY OF GAINESVILLE, PETITIONER,

*v.*

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR.

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## BRIEF FOR PETITIONER.

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CECIL MURPHY,
W. O. DAVIS,
*Counsel for Petitioner.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1927.**

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# No. 433

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CITY OF GAINESVILLE, PETITIONER,

*v.*

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR, RESPONDENTS.

---

## BRIEF FOR PETITIONER.

---

### Grounds of Jurisdiction.

This suit was brought in the District Court for Cooke County, Texas, on October 11, 1921, by the City of Gainesville (a Texas municipal corporation), hereafter called the city, against the Southern Construction Company (a partnership composed of Lester Levy and Harry D. Levy, citizens of Texas), hereafter called the Construction Co.; the Southern Surety

Company (an Iowa Corporation) hereafter called the Surety Co., and H. W. Head, a citizen of Texas, residing in Grayson County, to recover exceeding $15,000 (R., 119). Default judgment was rendered by said court in favor of the plaintiff against all defendants for $15,000 and against the Construction Co. for $4,090, which judgment upon appeal by Head and the Surety Co. was reversed by the Court of Civil Appeals for the Sixth District as to Head and the Surety Co. but affirmed as to the Construction Co. (See Head *vs.* City of Gainesville, 258 S. W., 323.) Upon the remand of the suit to the District Court of Cooke County, H. O. Head as executor made himself a party in lieu of H. W. Head, who had died, and he and the Surety Co. filed an answer to the petition alleging the invalidity of the warrants. Thereupon the city amended its petition making the Brown-Crummer Investment Company (a Kansas corporation), hereafter called the Investment Co., a party defendant, and the Investment Co. within the time allowed by law filed its petition to remove the cause to the District Court of the United States for the Eastern District of Texas upon the ground of a separable controversy. After a transcript of the proceedings was filed in said court, a motion to remand, timely made by the city, was overruled. All parties recast their pleadings in the United States District Court with exception of the Construction Co., which did not appear. The Investment Co. by cross-answer sought to recover judgment against the city for exceeding $12,000 (R., 119). The case was tried in said court on the 25th day of May,

1926 (R., 123). The court directed the jury to return a verdict in favor of the Investment Co., against the city, for $13,125 with interest at the rate of 6 per cent per annum from rendition, and that the city take nothing as to H. O. Head, executor of H. W. Head, deceased, and the Surety Co. upon the causes of action asserted by the city against them. A verdict was returned and judgment entered in accordance with the instructions of the court (R., 225 and 123). The city carried the case by writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, which on the 6th day of July, 1927, affirmed the judgment of the lower court (R., 294) in favor of the Investment Co. against the city, but the court being of the opinion that it was without jurisdiction of the controversy between the city and the other defendants, remanded the case as to them with directions to dismiss (R., 290 and 293). This being an action at law where the value in controversy exceeds $20 and there being evidence entitled to consideration, showing that the city had valid defenses against the cross-answer of the Investment Co., the trial court in directing a verdict against the city and the circuit court of appeals in affirming that action deprived the city of its right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States. The suit being between citizens of different States involving exceeding $12,000, the Federal court had jurisdiction and this Court has jurisdiction to review any ruling of the circuit court of appeals or of the district court deemed erroneous.

Under Section 28 of the Judicial Code, it is the suit and not the separable controversy only that is removed to the Federal court. Therefore, if there existed a separable controversy authorizing the removal of the suit, the District Court of the United States acquired jurisdiction of the entire case (Barney *vs.* Latham, 103 U. S., 205; Brooks *vs.* Clark, 119 U. S., 502; City of Beaumont *vs.* Fall, 291 S. W., 202).

## Statement of the Case.

Gainesville is a Texas municipality incorporated as a city of exceeding 5,000 under a special act of the Legislature approved March 17, 1909, of which the courts take judicial notice (Special Laws of the 31st Legislature, 501 and 537) (R., 131).

On the 20th of November, 1919, a contract was signed by the city and the Construction Co. (not conceded to be valid) (R., 138) concerning some paving to be done by the Construction Co. Under the contract, the city was to pay for the street intersections and for one-fourth of the other work, while the Construction Co. looked to the abutting lot owners for the remaining three-fourths (R., 137).

It was contemplated that the city's part of the paving would amount to $50,000. The Construction Co. agreed to accept the legally issued warrants of the city at par for the city's proportion of the cost (R., 140), to be paid monthly on the first regular meeting of the council after the first day of the month, as the work progressed on the engineer's written estimates, the city reserving 10 per cent until final completion (R.,

156). The work was delayed for various causes and up to September 20, 1920, the city's part of the only paving done amounted to $3,000, for which the city, on the 6th day of April, 1920, issued three warrants numbered one, two and three, for $1,000 each (R., 251), payable in one, two and three years, respectively, which warrants were paid at maturity. On or shortly prior to September 10th, 1920, some understanding was had not shown on the record by which the city was to issue the remaining $47,000 of warrants in advance of the work. In furtherance of this understanding, H. W. Head on September 10th, 1920, signed and delivered to the city this obligation:

SHERMAN, TEXAS, September 10, 1920.

To the City Council,
Gainesville, Texas.

GENTLEMEN:

By virtue of an order from the Southern Surety Construction Company any moneys due said Southern Const. Co., from the city of Gainesville for work done and materials furnished under a contract for street improvements is to be paid to me, said amounts being payable in city warrants.

I understand it is now the purpose and intent of the City Council of Gainesville, Texas, to have issued to said Southern Const. Co. ten thousand dollars in warrants, these warrants to be properly endorsed by Southern Const. Co., and delivered to me.

In the event of any dispute, discrepancy or other contingency arising which might in any

way affect the amount of work done or materials furnished by Southern Const. Co. so as to in any way affect said ten thousand dollars in warrants I hereby agree to protect and indemnify said City of Gainesville, Texas, up to the sum of ten thousand dollars.

None of said money will be paid or credited to Southern Const. Co., except in such amounts as may be shown to be due under signature of Mayor of Gainesville, Texas, and when such amounts shall equal ten thousand dollars then this obligation to be discharged.

In case of suit arising out of the matters set out herein or in case suit becomes necessary to enforce any rights secured hereby, such suit shall be filed in Cooke County, Texas.

H. W. HEAD.

This obligation was guaranteed by the Surety Co. (R., 13). On October 4, 1920, H. W. Head signed and delivered to the city an obligation precisely like the above except the warrants contemplated amounted to $37,000 (R., 15), which obligation the Surety Company guaranteed (R., 15). Thereafter, on the 21st of September, 1920, $10,000 of warrants were issued (R., 171), and on the 5th of October, 1920, $17,000 (R., 167); and on November 2, 1920, $10,000. (R., 172); and November 16, 1920, $10,000 (R., 172); making in the aggregate $47,000. These warrants were issued pursuant to resolutions of the same date.

The warrants when issued were immediately delivered to the Construction Co., and were immediately endorsed and delivered by the Construction Co. to

H. W. Head, who immediately delivered them to the Investment Co., the latter paying Head therefor 95¢ on the dollar.

Early in January, 1921, the Construction Co. again began work (R., 179) and did paving amounting to $34,736.29, including the $3,000 paid for in April, 1920 (R., 19 and 179 and 181), and quit. Thus leaving undone $15,263.71 of the $50,000 which the city had attempted to pay for in warrants (R., 19). On October 11, 1921, the city brought suit against the Construction Co., H. W. Head, and the Surety Co., in the District Court of Cooke County, Texas, to recover $15,000 of them as the difference between the paving paid for and the paving received and against the Construction Co. for $4,090 for claims against it alone (R., 119). Default judgment was rendered against all defendants for $15,000, and against the Construction Co. alone for $4,090 for other things (R., 120). This judgment was reversed upon appeal by Head and the Surety Co. upon the ground that the petition did not allege sufficient facts to support it. (Head *vs.* City of Gainesville, 254 SW., 323.)

Upon the remand of the case to the District Court for Cooke County, Texas, the defendant, Head, answered and alleged among other things that the warrants in question were illegally issued, void, and of no value (R., 120). Thereafter, on December 10, 1923, the city filed its first amended original petition making the Investment Co. a defendant, and while still alleging that the warrants constituted valid legal and binding promises and obligations of the city prayed in

case the court held otherwise, that the warrants be canceled and declared void (R., 121).

The case was next removed to the District Court of the United States for the Eastern District of Texas, upon the petition of the Investment Co. claiming that there existed in the case a separable controversy. There being no question in the trial court or in the circuit court of appeals in reference to the sufficiency of the pleadings to raise the question discussed, we believe that their substance need not be stated here. By cross answer filed May 17, 1926, the Investment Co. sought to recover judgment of the city for past due warrants 7, 8, 9, 10, 11, and 12 for $1,000 each, and on past due coupons on all of the warrants (R., 100). These warrants, while among the first maturing, were the last issued having been authorized by the resolution of November 16, 1920 (R., 172). To this cross answer, the city replied by first amended supplemental petition alleging the facts connected with the transaction and that the Investment Co. not only acquired the warrants with notice of the real facts, but devised the scheme under which they were issued (R., 102). There was no question in reference to the sufficiency of the amended supplemental petition.

The warrants were for $1,000 each, numbered one to fifty, inclusive, dated November 20, 1920, bearing interest at the rate of 6 per cent per annum from that date, payable semi-annually. Two of the warrants were payable each year to March 1, 1930, and thereafter three were payable each year. The warrants (R., 245) were in the following form:

No. ——.

UNITED STATES OF AMERICA.

STATE OF TEXAS,
*County of Cooke:*

City of Gainesville Street Improvement Warrants.

Series ——.

This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to The Southern Construction Company Contractor, their assigns or bearer, on the 1st day of March, 19—, at the office of The Brown-Crummer Investment Company, Wichita, Kansas, the sum of

One Thousand Dollars

in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the 1st day of March, 1920, and semi-annually thereafter on September 1st, and March 1st of each year; and the City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest payable at the place above named, upon presentation and surrender of warrant or proper coupon.

This Warrant is one of a series of Fifty (50) inclusive, in the denomination of One Thousand

($1,000) Dollars, issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to the Southern Construction Company, their assigns or bearer for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and laws of the State of Texas, and pursuant to an ordinance passed by the City Council of said City of Gainesville, Texas, on the 2nd day of December, 1919, recorded in Book 6, at page 570 et seq., of the Minutes of said City Council.

The date of this warrant, in conformity with the ordinance above mentioned, is November 20, 1919.

And It Is Hereby Certified and Recited That all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation.

In Witness Whereof the City of Gainesville has caused the corporate seal of said City to be hereto affixed and this warrant to be signed by its Mayor, and countersigned by its City Secretary, and registered by the City Treasurer, as of the date last above written.

E. N. BLACKBURN,
*Mayor, City of Gainesville, Texas.*

Countersigned:
S. A. BRYAN,
*City Secretary,*
*City of Gainesville, Texas.*

W. H. GARMANY,
*City Treasurer,*
*City of Gainesville, Texas.*

The form of the interest coupons was as follows (R., 247):

No. —. $30.

On the 1st day of March, 1920, The City Treasurer of the City of Gainesville, Texas, will pay to the Southern Construction Company, their assigns or bearer, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas, the sum of Thirty ($30) Dollars, the same being six months' interest due that day on City of Gainesville, Texas, Street Improvement Warrant, Series ——, No. —, dated November 20, 1919, to which this coupon is attached and is a part thereof.

E. N. BLACKBURN,
*Mayor.*

S. A. BRYAN,
*City Secretary.*

At the time of the issuance of these warrants no work had been done. These so-called warrants are in fact bonds, and void because not authorized by the qualified tax-paying voters of Gainesville at an election held for that purpose.

Article 701 of the Revised Statutes of 1920, page 229, says:

> "The bonds of a county or an incorporated city or town shall never be issued for any purpose unless the proposition for the issuance of such bonds shall have been first submitted to the qualified voters who are property taxpayers of such county, city or town."

Section 1, Article 4 of the charter of the city says:

> "No bonds shall be issued for any purpose in excess of $2,500 unless an election be ordered by the mayor and city council, and if at said election the majority of the votes polled shall be in favor of creating such debt it shall be lawful for the city council to make the issuance of the bonds as proposed in the ordinance submitting the same at the election so held" (R., 129).

The provisions of Article 701 of the statute overrides the provision of the charter authorizing the issuance of bonds to the amount of $2,500, which prohibits their issuance in any amount without the consent of the qualified taxpaying voters (City of Beaumont *vs.* Fall, 291 S. W., 202; Foster *vs.* City of Waco, 225 S. W., 1104; 113 Tex., 352; Pulte *vs.* Keel, 297 S. W., 241; Robertson *vs.* Breedlove, 61 Tex., 316; San Patricio County *vs.* McClane, 44 Tex., 392; Brenham *vs.* German American Bank, 144 U. S., 173).

Section 16, Article 9, of the Charter (R., 130), and Article 545 of the Revised Statutes in force in 1909, and now Article 1083, page 322, of the Revised Statutes of 1925, says:

"Whenever the city council shall determine to make any such improvement, they shall cause an estimate to be made of the probable cost thereof by the city engineer, or by some other officer of the city, or by a committee of three aldermen; and such engineer or other officer or committee shall also report a full list of all lots or fractional lots, giving number and size of the same, and the number of the block in which situated, and the names of the owners thereof, if known, and such other information as may be required by the city council; and if there be a lot or fractional lot the owner of which is not known, the same shall be entered on said list as unknown. The officer or committee aforesaid shall enter on said list, opposite each lot or fractional lot lying and being on each side of the street, avenue or alley so to be improved as aforesaid, one-third of the estimated expense for such work or improvement on such avenue, street or alley fronting, adjoining or opposite such lot or fractional lot; and, on the acceptance and approval of said report and list by the city council, said amount shall be imposed, levied and assessed as taxes, and shall be a lien upon the property until the payment of the same."

There is no pretense that this preliminary estimate was made or that this statute was complied with.

Section 6, Article 7, of the charter says:

"The city council shall sit with open doors, shall keep a journal of its proceedings, which shall be public and constitute one of the archives of the city. The council shall act only

> by ordinance, resolution or motion * * *. The ayes and nays shall be taken upon the passage of all ordinances or resolutions and entered upon the journal of its proceedings, and every ordinance, resolution or motion shall require on final passage the affirmative votes of a majority of all members of the city council present" (R., 131).

The minutes of the council show this:

> "September 16th, 1919.—Alderman Thomas made a motion that the city engineer prepare plans and specifications and advertise for bids for paving the courthouse square and Commerce Street from California Street to Scott Street with brick. Motion carried." (Book 6, page 524.)
>
> "On motion of Alderman Thomas, the council agreed to pave the intersections on any street that Mr. Levy, the paving contractor, can sign up the property owners on, and the council gave him an option on Lindsay Street and East and West California Street." (Book 6, page 524.)
>
> "On motion of Alderman Barrett, the contract with Mr. R. G. Carraway, paving engineer, was ordered signed by the mayor and secretary when same was approved by the city attorney." (Book 6, page 528.)

This is all the record shows.

The failure to comply with the statute in reference to the estimate of the probable costs rendered the contract and all proceedings thereunder void (Frosh *vs.*

City of Galveston, 73 Tex., 401; City of Corsicana *vs.* Kerr, 89 Tex., 461).

Section 28, Article 2, of the charter says:

> "All contracts, of whatever character, pertaining to public improvements, or the maintenance of public property of said city, involving an outlay of as much as two hundred and fifty dollars ($250), shall be based upon specifications to be prepared and submitted to and approved by the mayor and city council, and after approval of the mayor and city council, advertisement for the proposed work, or matters embraced in said proposed contract, shall be made, inviting competitive bids for the work proposed to be done, which said advertisement shall be put in a daily newspaper not less than ten times. All bids submitted shall be sealed and shall be opened by the mayor in the presence of a majority of the aldermen, and shall remain on file in the mayor's office and be open for public inspection at least forty-eight hours before any award for said work is made to any competitive bidder. The council shall determine the most advantageous bid for the city, and shall enter into contract with the party submitting the lowest secure bid, but shall always in every advertisement of public work or contract involving as much as $250, reserve the right to reject any and all bids. Pending the advertisement of the work or contract proposed, specifications therefor shall be on file in the office of the mayor, subject to the inspection of all parties desiring to bid." (R., 126.) (Special Laws, 31st Legislature, 513.)

There is no pretense that this provision of the charter was complied with.

The motion of September 16, 1919, was that the city engineer prepare plans and specifications and advertise for bids for paving the courthouse square and Commerce Street from California Street to Scott Street with brick (R., 173).

The advertisement for bids and instructions to bidders show upon their face that plans and specifications had not been approved by the city council and were not on file in the office of the mayor subject to the inspection of all parties desiring to bid, but were in the office of the engineer and a copy could be procured by a deposit of $10 (R., 133, 134). There were never any plans and specifications approved or filed. The only ones among the papers or records of the council are the copies attached to the bids.

While the motion says "The courthouse square and Commerce Street from California Street to Scott Street," Dixon and Davis Streets were also paved (R., 179).

The specifications did not mention any street but merely specified the kind of material, work, etc. (R., 141 to 165), nor did the instructions to bidders mention any streets (R., 131-134), nor did the bids mention any streets (R., 134 to 137). The only thing on the city's record in reference to the acceptance of the bid of the Construction Co. is this, appearing on the minutes of November 19, 1919:

> "Alderman Thomas made a motion that the bid of the Southern Construction Company be

accepted as presented leaving off construction bond required and the contractor put up $5,000 in collateral satisfactory to the council and pave with brick on the square, Dixon Street to Broadway, Commerce Street to Scott Street, material to be left open, Dixon Street to M., K. & T. R. R., material to be left open and the mayor and secretary be authorized to make the contract with the Southern Construction Company. A yea and nay vote was taken and resulted in eight yeas and no nays" (R., 164).

The warrants were fraudulently issued pursuant to a scheme devised by the Investment Company who acquired them with full notice. For $15,263.17 of such warrants the city has received no consideration. On the 19th of November, 1919, the day upon which the contract was awarded, the Investment Co., by J. E. Blaine, its agent, agreed to purchase the warrants from the Construction Co. at $.95 on the dollar (R., 207). The Investment Co. thereupon employed Harris, McCall & Graham, Dallas attorneys, to look after the matter. They prepared in duplicate the ordinance of December 16, 1919, confirming the contract and providing for the issuance of the warrants and on December 15, 1919, mailed them to the city secretary (R., 209). In this letter they instructed the secretary in reference to the passage of the ordinance and requested him to certify to the copy which they were enclosing and return it to them as a permanent record to be retained by the purchaser (R., 210). It is a justifiable presumption that Harris, McCall & Graham posted themselves in reference to what was done in order to be able to

pass upon the validity of the warrants. This ordinance of December 16, 1919, occupies pages 231 to 250 of the record. It recited that the contract was based upon specifications prepared and submitted to and approved by the mayor and city council which was untrue (R., 241). It further recites that the bids after being opened remained on file in the mayor's office open for public inspection for at least forty-eight hours before the contract was awarded to the successful bidder, which was untrue (R., 242). It further falsely recided that the Construction Co. had given bond in accordance with Section 29 of the charter, securing the faithful performance of the contract and securing the rights of subcontractors, materialmen and laborers (R., 243).

Section 29, Article 2, of the charter says:

> "The council shall require good and sufficient bond of the contractor with at least two good and sufficient sureties who shall be residents of the State of Texas" (R., 127).

Under Article 5161, page 1448, Revised Statutes, a contractor for public works and improvements is required before commencing work to execute the usual penal bond with additional obligation that such contractor shall promptly make payments to all persons supplying him with labor and materials in the prosecution of the work provided for in such contract. A penal bond is generally in double the amount involved and never less than the amount involved. The instructions to bidders required that the successful bidder should furnish bond in the amount of the bid from

a responsible surety company or from good and sufficient personal sureties (R., 133). The specifications and bid required a maintenance bond in the sum of 25% of the total cost of the improvement (R., 157). The bid of the Construction Co. bound the contractor to execute a construction bond for the performance and completion of the work and to keep the completed work in a state of repairs for five years (R., 134). After the bids were opened the bid of the Construction Co. was accepted, leaving off the bonds and substituting in lieu thereof collateral security of the value of $5,000, but the collateral was never put up. The contract contemplated expenditures by the city and abutting lot owners of exceeding $150,000, yet only $5,000 collateral was to be put up to secure the performance of this contract, payment for the work and material and the maintenance of the completed work for a period of five years. The contract as signed leaves out the construction bonds, the maintenance bond and the penal bond. The fact that these bonds were required of bidders certainly influenced their bids and caused them to bid higher than they otherwise would. The bonds and the agreement to maintain the work were parts of the contract bid on. The contract made must be the same as that bid on. (Dillon on Municipal Corporations, Vol. 2, Section 807, page 1213.)

Harris, McCall & Graham, after the ordinance of December 16, 1919, had been passed and approved, made material changes in the certified copy which had been sent to them as appears from their letter to J. E. Blaine, dated January 2, 1920, and directed that Blaine

see that the same changes were made in the original (R., 210). This letter Blaine sent from Wichita, Kansas, on January 8, 1920, to the city secretary and requested the secretary to look at the original and to be sure that the corrections enumerated were made (R., 212). The ordinance was passed and approved on December 16. Yet early in the following January, material changes were made in it by the attorneys for the Investment Co. and by the secretary at the solicitation of Blaine, the agent of the Investment Co. It seems that Harris, McCall & Graham were indifferent as to the real facts if things appeared regular on the record. On the 19th day of June, 1920, the Investment Co., through J. E. Blaine, its agent, entered into a contract with the city, in which the Investment Co. agreed to furnish the legal proceedings for the issuance of the warrants to the Construction Co. and to defray the expense of printing, as well as all other matters incidental to their issuance, in consideration of which the city agreed to pay to the Investment Co. 5% on all warrants, including the $3,000 issued in April, 1920 (R., 206). The resolutions of September 21, October 5, and November 2 and November 16 were prepared in Dallas in duplicate by Harris, McCall & Graham, the attorneys for the Investment Co., and were brought from Dallas to Gainesville by J. E. Blaine, the agent of the Investment Co. The carbon was used by the city and the original certified to and retained by Blaine. To the original resolution was attached affidavits to be made by the mayor and each alderman to the effect that they had inspected the paving and that it was

actually completed and the amount justly due. The council met at 7:30 at night and the resolutions were passed, the original certified and the affidavits made before adjournment (R., 171). Although the mayor was sick, these resolutions prepared at Dallas recited that he was present. When the council would adjourn, Levy of the Construction Co. and Blaine would go to the residence of the mayor and have him sign the papers (R., 184). The warrants as they were issued were endorsed by the Construction Co. and delivered to H. W. Head, who resided at Sherman, Texas. Head would draw upon the Investment Co. at Wichita, Kansas, for 95% of the principal of the warrants attached (R., 191, 193). Mr. Harris would send to the Investment Co. in every instance a copy of the record with his opinion endorsed. The 95% which H. W. Head received for the warrants never reached the city treasury. As these warrants were from time to time issued to the Construction Co., J. E. Blaine, its agent, was on hand and demanded and received the 5% which the city had agreed to pay (R., 214). The resolutions and the warrants for the 5% bear the same date (R., 214). The Investment Co. also demanded and received from the city the interest that had accrued on the warrants from November 20, 1919, to the time they were delivered by Head, which was something more than a year (R., 213). J. E. Blaine knew at the time the resolutions were passed and the warrants issued that the paving had not been done (R., 216).

The certified copies of the resolutions of September 21st, October 5th, November 2d, and November 16th,

produced by the witness Crummer, were certified to by S. A. Bryan, city secretary. These were typewritten with the exception of the blanks filled in with a pen. They are the originals of the carbon copies that were left with the council, and used by them. These resolutions were approved by the mayor upon the day of their passage and were certified to by the city secretary on the same day, and to each were attached the affidavits made on the same day by the mayor, aldermen and city secretary, before a notary public, and the certificate dated upon the same day in reference to the signatures of the mayor, secretary and treasurer. In other words, everything in the matter of certificates, affidavits and the like bear the same date as the passage of the resolution. The affidavits of the mayor, secretary and aldermen said that the statements contained in the resolutions were true and correct, and that the materials so furnished and the work so performed and covered by the estimate or claim had been by the council inspected and accepted and found to be in accordance with the contract and plans and specifications and had been determined by said council to be well worth the price agreed to be paid therefor as reflected in said statement of account or estimate, and that the City of Gainesville had received full value for the money represented by said warrants. To each of these transcripts was attached the certificate of W. M. Harris saying that he had examined the copy of the proceedings and the warrants and that in his opinion such proceedings show lawful authority and that he found the warrants to

have been properly executed and that in his opinion the warrants were valid and legally binding upon the City of Gainesville (R., 193 & 194).

Blanks were left in the typewritten resolutions sent from Dallas to Gainesville for the insertion of the estimates which the Construction Co. filled in by merely writing $1,700 for material furnished and work performed in one, and $10,000 in the other three (R., 169). The Investment Co. maintained correspondence with J. E. Blaine until the last warrants were paid for (R., 198). Neither J. E. Blaine nor any member of Harris, McCall & Graham was produced by the Investment Co. R. E. Crummer, the vice-president and manager of the Investment Co., was the only witness produced to show want of knowledge of the real facts. It was the duty of J. E. Blaine as representative of the Investment Co. to investigate and report on pending bonds and municipal issues (R., 195). Judge Harris looked after the transaction until it was completed (R., 195). Crummer testified: "I don't know what was in the contract between the city and the Construction Co." (R., 196). A letter from him to Blaine, dated June 18, 1920, shows that he did know the provisions of the contract (R., 203). The expression, "work performed and material furnished," as recited in the resolution did not strike him as peculiar (R., 196). He said he presumed the city officials prepared the resolution (R., 196). This he said though he had contracted to furnish the legal proceedings and his attorneys, Harris, McCall & Graham, prepared the resolutions and his agent Blaine brought

them to Gainesville and presented them to the council. There having been no election, these warrants must be sustained, if at all, as ordinary warrants upon the treasury to pay claims audited and allowed. Such warrants are not negotiable under the law merchant and are subject to any defense which the city has, such as fraud, illegality or failure of consideration, although transferred to someone who had no actual notice (Dillon on Municipal Corporations, Vol. 2, Sec. 856). Wall *vs.* County of Monroe, 103 U. S., 74; Mayor *vs.* Ray, 19 Wall., 468; Watson *vs.* City of Horon, 79 Fed., 449; San Patricio County *vs.* McClane, 44 Tex., 392; Lane *vs.* Hunt County, 35 S. W., 10; Shock *vs.* Colorado County, 315 S. W., 61; Lasater *vs.* Lopez, 110 Tex., 185; 217 S. W., 376; Robertson *vs.* Breedlove, 61; Tex., 316; Allan *vs.* Abernathy, 151 S. W., 348.

The provision of the charter in reference to approved plans and specifications are mandatory, and the failure to comply therewith renders the contract and the proceedings thereunder void. (Dillon on Municipal Corporations, Vol. 2, Secs. 806 and 807.) Limestone County *vs.* Knox, 234 S. W., 131.

Section 28, Article 2, of the charter, *supra*, says that bids, after being opened, shall remain on file in the mayor's office for public inspection at least forty-eight hours before any award for said work is made to any competitive bidder (R., 127). The minutes show that the council convened at 7:30 p. m. on November 18, 1919, and opened the bids (R., 128), and laid them over until November 19 and adjourned to meet at 7:30

p. m. on that date (R., 164), and that the council did meet at 7:30 p. m. on November 19 and awarded the contract to the Construction Co. (R., 164). The prescribed delay of forty-eight hours after the opening of the bids was intended to give time for inspection and consideration and to allow any citizen or other person interested to interpose any objections thereto. It is a mandatory provision that the council could not disregard at its pleasure.

The specifications, instructions to bidders, and the contract says: "The contractor in the construction of the work shall give preference in employment to citizens of the aforesaid city, and when citizens of said city are not available, shall give preference to citizens of the State of Texas" (R., 146). This provision is well calculated to hamper the contractor and increase the costs of the work. The charter of the city, the State statute, and the common law confer upon municipalities no authority to insert such provision in contracts. "A contract prohibiting the employment of any person or persons other than native born or naturalized citizens of the United States is illegal." (Dillon on Municipal Corporation, Vol. 2, Sec. 808).

The facts giving rise to the questions above discussed were alleged in the pleading and sustained by the evidence. They were also urged upon the trial court by requested instructions and by objections to the instructions given, reserved in the bill of exception and presented on error to the circuit court of appeals by specifications and brief.

Section 16, Art. IX, of the charter (R., 130), and Article 544 of the then Revised Statutes, which is Article 1082, page 322 of the present statute, says in reference to the costs of street improvements: "The city council shall pay one-third and the owner of the property two-thirds thereof, except at the intersection of streets, from lot to lot across the streets either way shall be paid for by the city alone. Said costs shall be assessed on the property fronting on said street so improved, to be collected in equal annual payments, not less than five in number. All moneys collected from these assessments shall be appropriated exclusively to the payment of the bonds issued for the payment of the costs of said improvement." Under the ordinance and contract under consideration three-fourths of the costs was assessed against the abutting lot owners, payable one-third on demand and one-third in one, and one-third in two years from date (R., 152 and 153).

**Specification of Errors.**

The specifications of error filed in the trial court and presented to the circuit court of appeals, and relied on here are as follows:

1

The court erred in refusing to give the first instruction requested by the plaintiff as follows:

> "The treasury warrants issued by the City of Gainesville to the Southern Construction Company described in the pleadings are void and of no validity, because issued without the

consent of the qualified voters of the city of Gainesville granted at an election held for that purpose."

2

The court erred in refusing to give the second instruction requested by the plaintiff as follows:

"The contract between the City of Gainesville and the Southern Construction Company and all proceedings thereunder are void, because said contract, among other things, was made without any preliminary estimate of the cost of the proposed street improvement as prescribed by the charter and the statute."

3

The court erred in refusing to give the third instruction requested by the plaintiff as follows:

"Under Sec. 28, Art. 2 of the Charter of the City of Gainesville contracts are required to be let to the lowest responsible bidder, after the adoption of specifications and the giving of notice. The contract in question having been changed in material respects after the bids were received, without being re-opened to competitive bidding as changed, is void."

4

The court erred in refusing to give the fourth instruction requested by the plaintiff as follows:

"The warrants issued by the City of Gainesville to the Southern Construction Company

are not negotiable instruments, and anyone acquiring such warrants takes subject to any defense that the city would have against them in the hands of the original holder."

5

The court erred in refusing to give the fifth instruction requested by the plaintiff as follows:

"Under the charter of the City of Gainesville in respect to street improvement the city could not pay for the paving of streets by the issuance of long-time warrants; but if without funds to pay for such improvement, the money therefor could not only be raised by the issuance of bonds pursuant to the consent of the qualified voters granted at an election held for that purpose; and that not having been done in this case the contract and the warrants issued pursuant thereto are illegal and void."

6

The court erred in refusing to give the sixth instruction requested by the plaintiff as follows:

"The instructions to bidders and the specifications and contract in question required that the contractor in the employment of labor should give preference to the citizens of Gainesville; and in default of citizens of Gainesville, to citizens of the State of Texas. These provisions were illegal and interfered with fair competition and rendered the contract and all proceedings thereunder void."

7

The court erred in refusing to give the seventh instruction requested by the plaintiff as follows:

> "The unquestioned proof shows that the City of Gainesville received no consideration for $15,263.73 of the Series of $50,000 of warrants issued by it, and that said excess of warrants over the amount of paving done are without consideration and uncollectible."

8

The court erred in refusing to give the eighth instruction requested by the plaintiff as follows:

> "In the acquisition of warrants notice to the agent is notice to the principal, and if J. E. Blaine knew that the warrants in question were issued before the paving, as to which each set of warrants applied, was done and were issued when nothing was due under the contract, then the Brown-Crummer Company is in no better position than the Southern Construction Company, and the Brown-Crummer Company acquired such bonds, if at all, subject to all the defenses the City of Gainesville had against them."

9

The court erred in refusing to give the ninth instruction requested by the plaintiff, as follows:

> "If J. E. Blaine was the agent of Brown-Crummer Company in the purchase of the warrants in question and during said agency and

before Brown-Crummer Company received the warrants and paid therefor said Blaine knew that they were issued for paving not done and in advance of the performance and acceptance of the work, then the Brown-Crummer Company acquired such warrants subject to all the defenses the City of Gainesville had against the same."

10

The court erred in refusing to give the tenth instruction requested by the plaintiff, as follows:

"If the evidence shows that J. E. Blaine was the agent of Brown-Crummer Company, you are then instructed that the knowledge of Blaine would be the knowledge of the Brown-Crummer Company. You are further instructed that in order for Blaine to have been the agent of Brown-Crummer Company it was not necessary for him, at the time of the transactions, to have been in their employ, receiving a salary, but if they entrusted him with the handling of the transactions with regard to the warrants and the purchase of the same, and carrying out these transactions, then you are instructed that this was sufficient to constitute him an agent."

11

The court erred in refusing to give the eleventh instruction requested by the plaintiff, as follows:

"It appears from the evidence that Mr. Harris was the attorney for Brown-Crummer Company in preparing sundry papers in the case,

by virtue of which certain ordinances were passed and the warrants issued; you are instructed that the knowledge of Mr. Harris was the same as the knowledge of Brown-Crummer Company."

12

The court erred in refusing to give the twelfth instruction requested by the plaintiff, as follows:

"The contract for the paving and the ordinances under which it was made prescribed that the abutting lot owner shall pay for three-fourths of the cost of the improvement in front of his property, in three annual installments, bearing interest at the rate of 8 per cent per annum, while the charter required that the abutting lot owner should pay for only two-thirds of the cost of improvement in front of his property, and that the assessments therefor should be payable in equal annual installments, not less than five in number; the failure of the contract and ordinances to comply with the charter in these respects renders the contract and all proceedings thereunder void."

13.

The court erred in refusing to give the following instruction requested by the plaintiff:

The contract between the city of Gainesville and the Southern Construction Co. is void because the unquestioned proof shows that the contract was awarded within less than forty-eight hours after the bids were opened.

14.

R. E. Crummer being an interested party, the jury were the sole judges of his credibility and did not have to accept his evidence as true, and the court therefore erred in instructing a verdict in favor of the Brown-Crummer Investment Company, based solely upon the testimony of said Crummer.

15.

The warrants in question not being negotiable instruments, the court erred in assuming that the Brown-Crummer Investment Co. was a *bona fide* holder, entitled to the protection accorded to *bona fide* holders of negotiable paper, and therefore erred in instructing a verdict in favor of said company.

16.

W. M. Harris, being the agent of the Brown-Crummer Investment Co. to furnish the proceedings in reference to the issuance of the warrants, and to see that everything was in proper shape, notice to him was the same as notice to the Brown-Crummer Investment Co., and the court therefore erred in instructing a verdict in favor of said company.

17.

J. E. Blaine, being unquestionably the agent of the Brown-Crummer Investment Co. in the purchase of the warrants in question, and there being abundant evi-

dence tending to show that said Blaine knew that the warrants were issued before the acceptance or performance of the work, and that the recitals in the resolution for their issuance were false, the court erred in instructing a verdict in favor of the Brown-Crummer Investment Company.

18.

The unquestioned proof showing that the city of Gainesville lacked something over $15,000 of receiving the paving that should have been constructed to entitle the Southern Surety Co. to the $47,000 of warrants, and there being no proof showing or tending to show that H. W. Head paid out upon orders approved by the mayor of Gainesville sums of money aggregating $47,000, the court erred in instructing a verdict in favor of the defendant Head and the Southern Surety Co.

19.

There being no proof that H. W. Head paid out any sums of money upon orders approved by the mayor of Gainesville, the court erred in instructing a verdict in favor of his executor.

20.

The warrants sued on being the last issued, the plaintiff received no consideration therefor or the consideration has wholly failed, therefore the court erred in directing a verdict against the plaintiff on said warrants.

21.

The court, in directing a verdict in favor of the Brown-Crummer Investment Co., deprived the plaintiff of its right of trial by jury, guaranteed by the Seventh Amendment to the Constitution of the United States.

22.

The circuit court of appeals erred in holding that it was without jurisdiction of a controversy between the city of Gainesville and the Southern Surety Company and H. O. Head, as executor of H. W. Head.

## ARGUMENT.

"A warrant," says Judge Dillon, "is a command of the council, board, or official whose duties it is to pass upon the validity and determine the amount of a claim against the municipality to the treasurer to pay money out of any funds in the city treasury, which are or may become available for the purpose as specified, to a designated person whose claim therefor has been duly adjusted and allowed." (Dillon, Volume 2, Section 850.)

"Being simply a means of paying a debt, it is necessarily implied that a valid debt or obligation of the corporation exists for which a warrant may be drawn. The warrant does not constitute a new debt, or evidence of a new debt, but is only the prescribed means for drawing money from the municipal treasury to pay an existing debt. It may also be laid down that, as a

general rule, the power to issue a warrant does not exist until the audit and allowance of the claim in the manner prescribed by statute." (Dillon, Volume 2, Section 851.)

Warrants cannot be issued and sold by the municipality in order to acquire money for any particular purpose. That is the office of bonds. With the consent of the qualified tax-paying voters, granted in an election held for that purpose, bonds can be issued and sold in order to acquire money to improve streets and to do other things of a public nature. Warrants were never intended for any such purpose, and their attempted use for that purpose is but an evasion of the law against issuance of bonds. (Ashby *vs.* James, 226 S. W., 737.)

In disregard of good business methods and of a mandatory statute, the council entered into a contract with the Southern Construction Company without exacting the bonds required by law. Had the bonds been given, the Construction Company, although insolvent, would have had credit and could have complied with its contract, but, being insolvent and not being backed by any bond, it was without credit. The warrants were issued in advance of the work, with the expectation that they would be sold and the proceeds used by the Construction Company to pay for the work as it progressed. The warrants were not issued in settlement of accounts that were due, but were issued in an attempt to finance the insolvent Construction Company and enable it to go ahead with the paving. In other words, the warrants were issued and sold for the purpose of raising

money to pay for the paving as it progressed—a purpose for which warrants were never intended, and which could only be accomplished by the issuance of bonds.

The circuit court of appeals says that the warrants were *escrowed* with H. W. Head, but not so. The warrants were issued, delivered, sold and put in circulation. An instrument that has been delivered and put in circulation cannot be *in escrow*.

Among the cases relied on by the Investment Co. is Graves *vs.* M. Griffin O'Neil & Sons *et al.*, 189 S. W., 778. That is a decision of an intermediate court, entitled to very little weight as authority. Besides, it was an appeal from an order dissolving a temporary injunction, the granting or dissolving of which rests largely in the discretion of the court. In addition to this, the petition was not properly verified, and after so holding anything further was *obiter dictum* merely. In that case, the so-called warrants were issued in advance of performance, and the ordinance or resolution evidently recited performance. It is strange that the court did not perceive that anything is a fraud upon the law where false recitals are necessary to give it the appearance of validity. The decision is in conflict with the subsequent cases of Foster *vs.* City of Waco and Pulte *vs.* Keel, *supra*.

City of South Houston *et al. vs.* Carman, 6 Fed., 358, is also relied on. The question there was whether the inhabitants, after the dissolution of an illegally organized municipality, were liable for the debts contracted by it while a going concern. That question is not in-

volved here. It will be noted that J. L. Arlitt devised that scheme, and he has established quite a reputation as a handy man where aldermen and county commissioners are seeking to evade the law.

Slayton & Co. *vs.* Panola County, 283 Fed., 330, is another case relied on. That was another fraudulent scheme devised by J. L. Arlitt, and a grievous fraud was perpetrated upon the taxpayers of Panola County. That is one of the recent cases seeking to make the law of negotiable instruments apply to illegally issued warrants.

We do not see that Scott County, Arkansas, *vs.* Advance-Rumley Thresher Co., 288 Fed., 739, has any relevancy to the question. In that case the question of innocent purchaser was not involved, for the court conceded that a purchaser of a warrant takes subject to all defenses that could be urged against the original holder. (See page 745 of that opinion.) In Texas it has frequently been held that an unauthorized act can not be ratified, for the self-evident reason that where there is no power to do, there can be no power to ratify. (City of Bryan *vs.* Page, 51 Tex., 532.)

Grimes County *vs.* W. L. Slayton & Co., 262 S. W., 209, cited by the Investment Co., is another decision of an intermediate court. In that case J. L. Arlitt figured, as usual. There new warrants were issued in lieu of previous warrants, irregular but not void. That case has no bearing upon this. City of Belton *vs.* Brown-Crummer Investment Co., 17 Fed., 2d Series, 70, cited by the other side, involved some refunding warrants, and nothing is there decided in any manner affecting

this case. Evansville *vs.* Dennett, 161 U. S., 434, relied on by the other side, relates to negotiable bonds and has no application to treasury warrants.

Lasater *vs.* Lopez, 110 Tex., 179, is relied on by the other side. That case involved the validity of county warrants issued in settlement for work done on the public roads of the county. A constitutional and statutory duty rested on the county to provide roads, but, unless authorized by statute, the county could not issue negotiable bonds or paper. The county could, however, issue warrants or other evidence of any debt it really owed, but such warrants or evidence were subject to any defense which could be made against them in the hands of the original holder.

As shown by the opinion of the court of civil appeals in the same case, 202 S. W., 1041, the warrants were payable in yearly installments extending over a period of sixteen and one-half years and had attached to them interest coupons representing semi-annual interest at the rate of 6 per cent per annum.

The opinion shows that since the beginning of government it had been the duty of the commissioners' court to establish and maintain public roads, but the opinion is wrong if it intends to say that prior to the inhibition against the issuance of bonds without the consent of the taxpayers, long-time warrants with interest coupons attached were ever employed.

Section 1, Article IV, of the charter says:

> "The city council of the city of Gainesville shall have power and authority by ordinance duly passed, if it so elects, to borrow money on

the credit of the city for permanent improvements, for public buildings, for the permanent improvements of its streets, avenues, alleys, public grounds, building of sidewalks, macadamizing, remacadamizing, paving and repaving of streets, alleys, avenues and public grounds, and for the purpose of providing the city with funds for the ownership of public utilities, including water, light, sewer and gas works; and the city council may issue bonds for the city of Gainesville for all or any of the above purposes to any amount not exceeding $150,000 in any one year; provided, that in addition the said city is expressly authorized to issue bonds for the purpose of refunding the bonds of the city previously issued; provided, that the bonds be refunded at the same or a lower rate of interest than the bonds proposed to be retired draw. It is further provided that debt shall never be created by the city of Gainesville unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent thereon.

"No bonds shall be issued for any purpose except the purposes above named, which shall not exceed $150,000 for any one year and for the purpose of refunding bonds previously issued.

"No bonds shall be issued for any purpose in excess of $2,500 unless an election be ordered by the mayor and city council, and if at said election the majority of the votes polled shall be in favor of creating such debt, it shall be lawful for the city council to make the issuance of the bonds as proposed in the ordinance submitting

the same at the election, at the election so held; but if a majority of the votes polled shall be against the creation of such debt, it shall be unlawful for the city council to issue the bonds.

"In all elections determining the expenditure of money for the assumption of debt only those shall be qualified to vote who pay taxes on property in said city and are legally qualified voters therein.

"No bond shall be issued drawing more than 5 per cent interest, and they shall be invalid if sold for less than par and accrued interest, and all bonds shall express upon their face the purpose for which they are issued.

"The ordinance authorizing any bonds to be issued shall provide for the creation of a sinking fund sufficient to pay the bonds at maturity and make provisions for payment of interest thereof as it matures, and said sinking fund may be invested in the bonds of the State of Texas or in bonds issued by the counties of the State of Texas, or such funds may be used for the purchase of bonds of the city of Gainesville which are not yet due, and neither interest nor sinking fund shall be devoted to any other purpose whatever" (R., 128).

There is conferred upon the council the right to borrow money for the purposes named, but the section prescribes that the money shall be borrowed through the issuance of bonds authorized by the qualified tax-paying voters. The bonds cannot bear interest at a rate exceeding 5 per cent and are rendered invalid if sold at less than par. Nor can exceeding $150,000 be issued in one year. This section seeks to restrict the

right of the council to anticipate and spend the revenues of future years, but the restriction would be meaningless if warrants such as we are considering could be sustained. There would be no limitation as to the amount and no restriction as to interest except the statute of usury. There would be nothing restricting the amount of warrants to a stated percentage of taxable values and exceeding $150,000 could be issued in one year. There would be no limitation as to time except the constitutional requirement of a sinking fund of not less than 2 per cent.

Lasater *vs.* Lopez, 110 Tex., 179, so much relied on by the other side, relates to county, not city warrants. It states that there is imposed upon county commissioners a constitutional and statutory duty to provide roads, courthouses and jails. The opinion is correct in stating that it has always been the law is Texas, as elsewhere, that county warrants are not negotiable instruments and that the purchaser is in no better position than the original holder. The opinion is also correct in saying that the evasion of the law against the issuance of bonds should not be countenanced. In that case the jury had found that the warrants had been issued in good faith and without intent to evade the statute against the issuance of bonds. In Lasater *vs.* Lopez, the warrants aggregated $60,000, payable in yearly installments extending over a period of sixteen and one-half years. This case was held inapplicable to cities in the subsequent cases of Foster *vs.* City of Waco and Pulte *vs.* Keel. If Lasater *vs.* Lopez be cor-

rect, it must be admitted it stretches the law very nearly to the breaking point. If the city of Waco had issued warrants instead of promissory notes, the decision would have been the same, for it is the substance, not the form, of the transaction that controls.

Can it be truthfully said that in the present case there was no intent to get around the provisions of the charter against the issuance of bonds without the consent of the qualified taxpaying voters? The Investment Co. engaged in the business of underriding municipal securities, the contemplated purchaser of the warrants through its agent and attorney prepared an ordinance and resolutions containing many false recitals and prepared affidavits to be signed by the aldermen and other officials containing nothing but falsehoods. It was contemplated by the Investment Co. and its attorney that a certified copy of the ordinance, resolutions and affidavits should accompany the warrants, in the hope that a purchaser from the Investment Co. would rely thereon and would be protected from any defense that the city might have in like manner as if the warrants were negotiable bonds. In other words, through these false recitals and false affidavits, the warrants were sought to be given the properties of negotiable instruments. Can it be said that this fraudulent scheme was devised by the Investment Co. and its attorney and agent in good faith?

**No Preliminary Estimates of Costs.**

"Individual members of the common council were not invested by the charter with any power to improve

the city property, and any directions given or contracts made by them upon the subject had the same and no greater validity than like directions given and like contracts made by any other residents of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally, they could not by any subsequent approval or conduct impart validity to such contract. But we go further than this; the common council even could not by any subsequent action give validity to a contract thus made. The mode in which alone they could bind the corporation by a contract for the improvement of city property was prescribed by the charter, and no validity could be given by them to a contract made in any other manner. The rule is general, and applies to the corporate authorities of all municipal bodies; where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of power. Thus, where authority is conferred to sell property, with a clause that the sale shall be made at public auction, the mode prescribed is essential to the validity of the sale; indeed, there is no power to sell in any other way. Aside from the mode designated, there is a want of all power on the subject. This is too obvious to require argument, and so are all the adjudications." (Zottman *vs.* San Francisco, 20 Calif., 96; 81 Am. Dec., 100.)

Revised Statutes, Article 1083, formerly 554, and Section 16, Art. IX, of the charter prescribes that when a city council shall determine to make any street im-

provement, they shall cause an estimate to be made of the probable costs thereof by the city engineer or by some other officer of the city or by a committee of three aldermen, and such engineer or other officer or committee shall also report a full list of all lots or fractional lots giving number and size of the same and the number of the block in which situated and the names of the owners thereof if known, and such other information as may be prescribed by the city council. This seems to be a very important provision, intended to prevent the council from improvidently entering into a contract without knowing the ultimate liability.

In Frosh *vs.* City of Galveston, 73 Tex., 401, the Supreme Court of Texas, on March 26, 1889, held that the failure to make the preliminary estimate rendered the whole proceedings void. The charter requirements in that case were substantially the same as Article 1083. This case was followed in City of Corsicana *vs.* Kerr, 89 Tex., 461, where the proceedings were under Article 1083 of the present revised statutes, which was then Article 475. See also Kerr *vs.* City of Corsicana, 35 Tex., 694, where the court of civil appeals had passed upon the same case. The Supreme Court said:

> "The evidence introduced in the district court showed that at the time the City of Corsicana determined to make the improvement upon the streets in question a committee was appointed, as required, to make the assessment of the cost of the work in accordance with Articles 474 and 475 of the Revised Statutes, but did not show that the committee made the as-

sessment, but that after the work was done an assessment was made. The City of Corsicana upon the trial in the district court offered to prove by parol evidence that the committee did make an assessment of the cost of the work against each lot as required by law and that said committee made a report thereof in writing which was deposited with the secretary of the city, but did not offer to show that the report so made was accepted and approved by the city council. The testimony thus offered was excluded by the district court, to which ruling the city excepted, saved a bill of exceptions in due form, and presented the ruling by cross assignment in the court of civil appeals.

"The court of civil appeals held that the evidence offered was properly excluded, and that the assessment required by the law to be made, the making of the report by the committee, and its acceptance and approval by the city council, were conditions precedent to the letting of a contract for the work, and that this, not having been done in this case, the assessment made upon the property of the plaintiffs was void, constituted no ground for a recovery by the city, and furnished no authority for the city to sell the property of the plaintiffs. We think that the court of civil appeals properly construed the articles referred to, and we affirm the judgment of that court in reversing the judgment of the district court. We deem it unnecessary to add anything to the opinion of the court in this case. In accordance with the statute we proceed to enter judgment as follows:

> "It is ordered, that the defendants in error have judgment against the City of Corsicana perpetuating the injunction granted by the judge of the district court enjoining the said city, its officers and committee, from advertising, selling or making deeds to any of the lots named under or by virtue of the said assessments, and that the defendants in error each recover of the said City of Corsicana all costs in this behalf expended in each and all the courts; that this opinion and the judgment of this court be certified to the District Court of Navarro County for observance."

The attorneys on the other side seek to avoid the force of these decisions by saying there is no proof that the preliminary estimate was not made. Section 6, Article VII, of the charter says:

> "The council shall act only by ordinance, resolution or motion, and that the council shall sit with open doors, and keep a journal of its proceedings, which shall constitute one of the archives of the city" (131).

The aldermen constituting the council have no power as individuals, but can only bind the city when convened in session as prescribed by law. The transcript contains all that appears on the records of the council concerning the paving prior to the opening of the bids on November 8, 1919 (174), as follows:

> September 16, 1919.
>
> "Alderman Thomas made a motion that the city engineer prepare plans and specifications

and advertise for bids for paving the courthouse square and Commerce Street from California Street to Scott Street with brick. Motion carried" (173).

"On motion of Alderman Thomas, the council agreed to pave the intersections of any street that Mr. Levy, the paving contractor, can sign up the property owners on, and the council gave him an option on Lindsay Street and East and West California Street" (173).

September 16, 1919.

"On motion of Alderman Barrett, the contract with Mr. R. G. Carraway, paving engineer, was ordered signed by the mayor and secretary when same was approved by the city attorney" (173).

There is nothing in the record showing or tending to show that any estimate of the costs of the proposed improvement was ever made, and in fact none was made or attempted to be made. The ordinance of December 16, 1919, approving the contract, while purporting to recite everything that had been done, makes no mention of a preliminary estimate of costs (46). The silence of the minutes and records in the absence of any proof to the contrary is sufficient to show that the preliminary estimate was not made. The first and only mention of the proposed paving is the motion requiring the engineer to prepare plans and specifications and advertise for bids, but no plans and specifications were ever approved by the council. In City of Corsicana *vs.* Kerr, the silence of the record was held to be con-

clusive that the preliminary estimate had not been made.

There does not attach to the abutting lot owner any liability to pay for the improvement in front of his property unless the city council proceeds in accordance with the requirements of the charter or statute. In like manner, no liability attaches to the general taxpayer unless the law has been complied with. The other side cites City of Beaumont *vs.* Masterson, 142 S. W., 984, which is irrelevant to any issue here. There the city of Beaumont was paying for the entire paving out of the proceeds of a bond issue and obligated itself to the contractor to pay for the paving. The city was looking to the abutting lot owners for reimbursement in part, but failed to secure reimbursement to some extent on account of some of the abutting property being homestead upon which no lien could attach. We cannot see wherein City of Corsicana *vs.* Mills, 235 S. W., 220, has any application to this case. Here the contractor in the specifications, bid and contract agreed to look to the abutting lot owners for their *pro rata* of the costs of the paving. The rule seems to prevail everywhere that if there be a failure to do any material thing that the statute or charter says shall be done, the proceeding is void and no liability attaches either to the abutting lot owner or to taxpayers in general.

**No Approved Specifications and contract Awarded Before the Council had a Right to do so.**

The charter, Section 29, Article II (127), says: "All contracts pertaining to public improvements involving

an outlay of as much as $250 shall be based upon specifications, to be prepared and submitted to and approved by the mayor and city council, and after approval by the mayor and city council, advertisement for the proposed work shall be made, inviting competitive bids for the work proposed to be done, which advertisement shall be published in a daily newspaper not less than ten times. Pending the advertisement of the work or contract proposed, specifications therefor shall be on file in the office of the mayor, subject to the inspection of all parties desiring to bid."

It will be observed that the specifications must be submitted to and approved by the mayor and city council before the invitation to bidders is published. Here no specifications were ever submitted to or approved by the council. On the 16th of September, 1919, a motion was carried directing the engineer to prepare specifications and advertise for bids. The instructions to bidders stated that specifications might be obtained at the office of R. G. Carraway, the city engineer, Gainesville, Texas, upon the deposit of $10, which would be returned upon the submission of a *bona fide* bid (133-134). This shows that there were no approved specifications on file with the city secretary. No specifications had been approved or submitted to the council, for if that had been done it would appear upon the minutes. This provision of the charter cannot be otherwise and mandatory. When the law says that a contract cannot be let unless specifications have been approved and competitive bidding invited upon

such approved specifications, the law means just what it says. A contract let without compliance with this legal requirement is void and unenforceable.

Judge Dillon, Volume 2, Section 801, says: "Where the charter or incorporating act requires the officers of the city to award contracts to the lowest bidder, a contract made in violation of its requirements is illegal; and in an action brought on such contract for the work the city may plead the illegality in defense; and neither the municipality nor its subordinate officers can make a binding contract for such work except in compliance with the requirements of the law."

The Investment Co. realized this, for we find that the warrant ordinance prepared by its attorneys falsely recited that the specifications had been approved by the council before competitive bidding was invited, thus laying the foundation for an estoppel.

Section 28, Article II, of the charter, further says: "All bids submitted shall be sealed and shall be opened by the mayor in the presence of a majority of the aldermen, and shall remain on file in the mayor's office and be opened for public inspection at least forty-eight hours before any award for said work is made to any competitive bidder." (127)

In defiance of this provision of the charter, the contract was awarded to the Construction Co. twenty-four hours after the bids were opened. The minutes of the council show when the bids were opened and when the contract was awarded. Yet we find the ordinance prepared by the Investment Co.'s attorneys falsely reciting that they remained on file after being open forty-eight hours before the contract was awarded.

**Contract Void Because Let Without Competitive Bidding.**

Before bidding can be invited specifications must be approved by the council and on file in the mayor's office. This is essential in order that each bidder may know just what he is to do. The specifications must be such that each bidder has in mind the same thing, for otherwise there can be no competition. While no specifications were approved by the council, they were prepared by Carraway, the engineer, together with instructions to bidders, and these specifications and instructions to bidders were attached to the bids and made a part of the same. The specifications show that the bidder should look to the abutting lot owners for three-fourths of the costs, exclusive of street and alley intersections (152). The specifications require that the successful bidder, before final payment, should execute a bond in 25 per cent of the entire costs, conditioned to keep the improvement in good repair for a period of five years (152). The instructions to bidders required of the successful bidder a bond in the amount of his bid from a responsible surety company, conditioned that he would comply with the contract (133). In addition to this, the State law required a penal bond to pay for the work and material entering into the improvement. In its bid the Construction Co. agreed upon its acceptance to execute a contract and bond for the performance and completion of the work and to keep the completed work in repair for five years (134). It was well known that the city did not have funds to

pay for its *pro rata* in cash, but the specifications are silent upon the subject. The contract, however, provides that the contractor would accept legally issued warrants for the city's *pro rata* of the costs (140). The contract further provides that in lieu of construction, maintenance, and other bonds, the Investment Co. should deposit $5,000, or its equivalent, satisfactory to the city, which, however, was never done (140). The obligation to maintain, the construction bond and the penal bond to pay for the work and materials were material elements in the contract bid on and necessarily influenced the minds of bidders. Statutes like these are mandatory and municipalities cannot make binding contracts without complying with requirements of the law (Dillon, Vol. 2, sec. 801). Cheaper or different material cannot be substituted after the bid has been accepted, nor can the obligation to maintain the work for five years and to give the bonds required by law be dispensed with.

> "In keeping with the same general principle that all the proceedings must be of such a nature as to secure competition, the bid must conform to the plans, specifications, and advertisement of the municipality, and the contract entered into must also conform to the plans, specifications, and advertisement. If a contract differing therefrom in terms be awarded or made, it cannot be said to have been the result of competition which the statute requires, and it is invalid. The rule that the contract must conform to the plan, specification, bid, and advertisement applies, although but one bid was made, and although there is no allegation or suggestion of

fraud, and although the change made in the contract is to the advantage of the city" (Dillon, Vol. 2, Sec. 807).

**Restrictions in Reference to Labor.**

The specifications say: "The contractor in the construction of the work shall give preference in employment to the citizens of the aforesaid city, and when citizens of said city are not available shall give preference to citizens of the State of Texas" (146). Can the city council thus increase the cost of improvement by restrictions in reference to the labor employed? All such restrictions hamper the contractor and enhance the costs of the work. If the labor can be restricted to citizens of Gainesville, why could it not be restricted to men professing a certain religion or to members of the Ku Klux Klan?

**The Law was Disregarded in the Apportionment of the Costs Between the City and the Abutting Lot Owners and in Fixing the Time Within Which the Lot Owners Should Pay.**

Article 1082 of the Revised Statutes, which is a part of the city charter, says that the city shall pay one-third of the costs of street improvement and the abutting lot owners two-thirds, except at the intersection of streets from lot to lot across the streets, either way, shall be paved by the city alone. Here, in defiance of the statute and charter, three-fourths of the costs was assessed against the abutting lot owners. The same section says that the assessed costs against the

abutting lot owners shall be collected in equal annual payments, not less than five in number, while here the abutting lot owners were required to pay one-third cash and the balance in one and two years. A burden cannot be imposed upon the lot owners without strictly complying with the law, nor can a burden be imposed upon the city without in like manner complying with the law. The city council has only such authority as the statute and charter confer.

**No Estoppel.**

On page 43 of our adversaries' brief, it is imagined that the city council accepted $5,000 of Liberty Bonds in lieu of the five years' maintenance bond the Construction Co. had agreed to give. Liberty Bonds are nowhere mentioned in the record. In lieu of the construction, the penal and the maintenance bonds, the Construction Co. agreed to put up $5,000 in money, or its equivalent, but never did so. Whether the assessments against the abutting lot owners have or have not been paid is irrelevant to any issue here, but there is no proof of their payment. Mr. Blanton, the only witness, says: "My impression is that all these paving certificates issued against the property owners have been paid. I don't know about that. I didn't say positive whether they have or not" (182). Upon the testimony of a witness who didn't know, it is positively asserted that the certificates have been paid.

The other side rely on Branch *vs.* The City of Sour Lake, 9 Fed., 2d Series, 971. That case involved the validity of debts contracted by an illegally organized

municipal corporation while a going concern, and which, after contracting the debts, had been dissolved by judicial proceedings. No question like that is involved here. That is a district court decision and cites Slayton *vs.* Panola County, 283 Fed., 330, and Scott County *vs.* Thresher Co.. 288 Fed., 739. The former was a decision by the same district judge. Scott County *vs.* Thresher Co. does not sustain the contentions. It is there held that county warrants are not negotiable paper and that the purchaser takes subject to any defense the county may have and that the refunding warrants have no greater validity than the original warrants. It was held, however, that by accepting and using the machinery, the county rendered itself liable to pay for the same, but this is not the rule in Texas. Here an attempted purchase on credit, without compliance with the law, is void, and the seller can recover the property. No obligation to pay arises from its use, for, if so, there could be done indirectly what cannot be done directly.

If, as claimed by the other side, it is established law in Texas that the revenues of future years can without limitation be anticipated and spent by means of so-called treasury warrants, it is strange that the larger cities, such as Dallas, Fort Worth, San Antonio, Galveston and Houston have not been using them. It is only the governing bodies of a few small cities that have attempted to do so. The bulk, if not all, of these warrants have been issued within the last ten years. Many, if not the bulk of them, have been fraudulently issued. By false recitals on the records it is sought

to give to fraudulent warrants the property of negotiable paper. Pulte *vs.* Keel was a well-considered case. Every decision upon the question was cited in the briefs and arguments of counsel. The attorneys for warrant buyers appeared there as friends of the court and filed briefs. These briefs in behalf of the warrant buyers accompanied the petition for writ of error to the supreme court. It is a reflection upon that court to say that it did not know of every decision in the State upon the questions involved. The Supreme Court of Texas refused the application for writ of error. By refusing the petition the supreme court approved the result and the law as declared. (General Laws, Fortieth Legislature, page 215.) Can we believe that the supreme court had never heard of these vaunted decisions and settled rules of law until our adversaries appeared as friends of the court and told them of the many things they had overlooked? The supreme court did reconsider its refusal and granted the writ, not on account of any error, but because of the conflict between the opinion in Pulte *vs.* Keel and the opinion of the circuit court of appeals in this case. In view of that conflict, the Supreme Court of Texas evidently concluded to give the question further consideration. A conflict between the Texas courts and the U. S. Circuit Court of Appeals upon a question of local law would be productive of much mischief.

This court has long held that municipal warrants or orders on the treasury are not negotiable instruments, and any defense can be made against the purchaser that could have been made against the original holder.

Wall *vs.* County of Monroe, 103 U. S., 74; The Mayor *vs.* Ray, 19 Wall., 468. This rule is nowhere more firmly established than in Texas by a long line of decisions, beginning with San Patricio County *vs.* McClane, 44 Tex., 392, and ending with Lasater *vs.* Lopez, 110 Tex., 185.

It is conceded that for $15,263.71 of this issue of warrants the city of Gainesville received no consideration and that they could not be collected in the hands of the Construction Co., to whom they were issued. It is sought, however, to give to these warrants the properties of commercial paper under the law of estoppel. Every warrant issued, expressly or by necessary implication, states that the claim has been audited and found to be just and due. The recitation of an audit has never been held to make the warrant a negotiable instrument. A municipal corporation is not estopped after a warrant upon its treasury has been issued to set up the defense of *ultra vires* or fraud or want or failure or consideration. (Dillon, Vol. 2, Section 857.) In any event, in order for the city to be estopped, the warrants must be acquired by someone who is ignorant of the facts and has been misled by some misrepresentation. The man who originated the scheme and prepared the proceedings is entitled to no consideration. It is not the duty or the business of an alderman to make affidavits, and he cannot bind the city by so doing. The fact that affidavits were prepared by the attorneys of the Investment Co. and made by the mayor and aldermen and attached to the transcript naturally would give rise to just grounds to the suspicion that

so much drapery was to conceal some known deformity. If the transaction had been honest, the recitations in the resolutions would have been considered sufficient.

Here the only witness to support the estoppel is R. E. Crummer, the Vice President and Manager of the Investment Co., a deeply interested witness. The jury is the judge of the weight to be attached to the evidence of an interested witness. (McCormick *vs.* Kampmann, 102 Tex., 215; Bolt *vs.* State Saving Bank, 145 S. W., 707; Smith *vs.* Milan, 143 S. W., 293; Schumann *vs.* Brownwood Mutual Life Association, 286 S. W., 202; Cheatham *vs.* Riddle, 12 Tex., 112; Coats *vs.* Elliott, 23 Tex., 613.

In September, 1920, the Investment Co. wrote to its attorneys, Harris & Graham, at Dallas, saying they believed that their Mr. Moore suggested to either Harris & Graham, or Mr. Blaine, that it was practicable to arrange for the delivery of the entire series of warrants to the American State Bank at Wichita, Kansas, upon the understanding that the various installments would be approved and released as the estimates were allowed (262). Mr. Crummer was an intelligent man and an underwriter of municipal securities. He knew that warrants could not be issued except as the paving was completed and accepted. This letter shows that Mr. Crummer was in touch with his agent, Blaine, and with his attorneys, Harris & Graham, and that his Mr. Moore had been making suggestions. When we keep in mind the nature of warrants, we realize that they could not be issued in advance of acceptance of the work, and if such was attempted it would be a

fraud. Therefore, to give semblance of validity, false recitals must be made. Yet Mr. Crummer professes to be misled by his own work. Blaine was the agent of the Investment Co. and made the contract with the Construction Co. for the purchase of the warrants at a discount of 5 per cent on November 19, 1919, the day the contract was awarded. He also, as agent of the plaintiff, made a subsequent contract with the city by which the city was to pay 5 per cent on the warrants in consideration of the Investment Co. doing the printing and furnishing the legal proceedings. Harris & Graham were employed by the Investment Co. soon after November 19, 1919, to look after the matter. They, of course, in order to be able to advise intelligently, posted themselves in reference to everything that had been done. They prepared the ordinance of December 16, 1919, confirming the contract and containing many false recitals. In other words, it recites not what had been done, but what should have been done to give the contract any validity (165). After this ordinance had been passed and approved, Harris & Graham made some changes in the certified original, which they retained, and requested the secretary to make like changes in his record. Yet the Investment Co. claims to have been misled by its own work done through its attorneys. The warrant resolutions prepared in Dallas by Harris & Graham are full of false recitals and were brought by Blaine, the Investment Co.'s agent, to the city council, and he stood by while they were being passed. When they were passed he went with Levy to the mayor to have the ordinances approved and the

warrants signed. Blaine and Harris were connected with the transaction as representatives of the Investment Co. from November 19, 1919, until it was finally closed. Blaine was on hand whenever an installment of warrants were sold to collect for the Investment Co. its commission of 5 per cent. Harris and Blaine were the agents and representatives of the Investment Co. and were witnesses hostile to the city. They were not produced by the Investment Co. The failure of a litigant to produce its agents and employees through whom he made the transaction gives rise to unfavorable presumptions. Why were they not produced? They were not produced because the unfavorable presumptions arising from the failure to produce were less damaging than the facts.

Mr. Crummer, the only witness, testified: "I didn't know what was in the contract between the city and the Construction Company. I didn't know the details of the contract. I can't say that the expression, 'Work performed and material furnished,' struck me as somewhat peculiar. I presume the city officials prepared the resolution" (196).

Mr. Crummer professed ignorance of the contract, while in his letter of June 18, 1920, to J. E. Blaine he showed that he was familiar with its provisions and knew its contents (203). He testified that he presumed that the city officials prepared the warrant resolution, when, under his contract with the city of June 18, 1920, the Investment Co. bound itself to furnish the legal proceedings (206). Mr. Crummer doubtless knew that his attorneys, Harris & Graham, prepared the resolu-

tions and affidavits. A jury had the right to look with suspicion upon his evidence. This effort to create the false impression that he did not know the provisions of the contract and presumed the city officials prepared the warrant resolutions shows that his evidence is not to be depended on.

The contract between the city and the Construction Co. provided for monthly payments on engineer's estimates as the work progressed. These estimates were to be furnished and the warrants issued at the first meeting of the council in each month, which was the first Tuesday. Ten per cent was to be withheld until final completion. Between the first of September and the 17th of November $47,000 in warrants were issued when not a single lick of work was being done. The resolutions show upon their face that no engineer's estimates were made, for in the blank left for the estimates is this: "Work performed and material furnished, $17,000. Southern Construction Co. by H. D. Levy." The resolutions show upon their face that nothing was held back, but the full amount for the imaginary work was paid. This should have excited the suspicion of any reasonably prudent man. Blaine was before the council on September 16, 1920, when $10,000 of warrants were issued, and on October 5, 1920, when $17,000 were issued, and on November 2, 1920, when $10,000 were issued, and on November 16, 1920, when $10,000 were issued. These resolutions were prepared in Dallas by Harris & Graham and brought by Blaine to Gainesville. Judging by these resolutions, $141,000 of paving was completed between

the 1st of September and the 16th of November, for the city's part, amounting to $47,000, would indicate a total cost of at least three times that amount. Yet, during that entire time, not a lick of work was done or a foot of paving laid. The recitals in the resolution are a fabrication. Is it possible that neither Harris nor Blaine knew the real facts? The aldermen say that Blaine did know the paving had not been done. The warrants were being issued pursuant to a fraudulent scheme devised by whom? Certainly not by the members of the city council. Our opponents say that there is no proof that Blaine was in Gainesville during daylight. That is all that they say in behalf of their agent, whom they declined to produce as a witness. If he did not know that the paving was not done, why did not the Investment Co. call him as a witness? The streets of Gainesville were lighted, and it was evident to anyone that this $141,000 of imaginary paving had not been done. None of the paving contemplated by these warrants was done until 1921. But it is said that, according to the understanding of Alderman Lewis, the warrants were supposed to be held by Mr. Head in *escrow*. The city council can only act by ordinance, resolution or motion, and the understanding of Mr. Lewis is immaterial. The fact is, Mr. Lewis while he used the term "*escrow*," did not know its legal meaning. That which was done was in fact intended. The warrants were delivered to the Construction Co., by whom they were indorsed and delivered to H. W. Head, and by him were delivered to the Investment Co., the purchaser, and put in circulation. The city accepted

the obligation of H. W. Head to protect it from loss that might arise from the illegal and wrongful issuance and delivery of the warrants. Blaine, the agent of the Investment Co., knew all about the transaction and looked after it until the Investment Co. received the last issue of warrants and received the 5 per cent which the city paid to the Investment Co. for devising and perfecting the scheme. The city, not the Investment Co., was entitled to an instructed verdict. This doctrine of estoppel, existing only in the Fifth Circuit, arising from the recitals in non-negotiable instruments is something new under the sun. It matters not what may be the recitals in a negotiable instrument, a purchaser after maturity takes subject to all the defenses that existed against the original holder. These warrants were never negotiable instruments and are and have ever been like a negotiable instrument after maturity.

**H. W. Head's Estate and Southern Surety Company Liable.**

If the warrants in question are valid and the city of Gainesville is forced to pay them, judgment should be rendered against the estate of H. W. Head and the Southern Surety Company. They bound themselves to see that the city received $47,000 of paving as per contract. There is neither allegation nor proof that H. W. Head ever paid out any money upon claims approved under the signature of the Mayor of Gainesville. We cannot see where the estate of H. W. Head has any defense to the action in case the warrants are valid and binding obligations.

**Jurisdiction.**

We do not see that any separable controversy between citizens of different States arose in the State court. There was certainly no removable, separable controversy between the Investment Co. on the one hand and H. W. Head's estate or the Southern Surety Co. on the other, for neither claimed anything of the other. Nor was there any separable controversy between the city of Gainesville and the Investment Co. that could be disposed of in the Federal court disconnected with the other issues. The city of Gainesville not claiming the warrants to be invalid, alleged the facts, but ask in the event that they were held invalid that they be so adjudged. The city was seeking a personal judgment against H. W. Head's estate and the Southern Surety Co. Now, how could this controversy between the city and the Investment Co. be disposed of in the Federal court without the presence of the other parties? If removable at all, the entire case went to the Federal court. It is the suit and not the separable controversy that is removed and the Federal court grants full relief to all the parties. Barney *vs.* Latham, 103 U. S., 205 and 212; Cornell *vs.* Smiley, 256 U. S., 501; Hamilton *vs.* Empire Gas & Fuel Co., 297 Fed., 429.

All of which is respectfully submitted.

CECIL MURPHY,
W. O. DAVIS,
*Counsel for Petitioner.*

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No. 433

IN THE

# Supreme Court of the United States

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CITY OF GAINESVILLE, PETITIONER,

vs.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR OF H. W. HEAD.

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## BRIEF OF BROWN-CRUMMER INVESTMENT COMPANY.

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### PRELIMINARY

The Brown-Crummer Investment Company did not file brief herein in response to the petition for a writ of certiorari because it did not receive notice of the date fixed for the submission of the petition and did not anticipate that such petition would be submitted as early as it was in fact submitted.

The petitioner, City of Gainesville, complains of the action of the Circuit Court of Appeals in hold-

ing that the removal of the case to the Federal Court operated merely to remove the controversy between the City and Brown-Crummer Investment Company. We shall submit no argument upon that question. We assume that Brown-Crummer Investment Company is not interested in same one way or the other, because at most this Honorable Court would direct the Circuit Court of Appeals to decide instead of dismissing the controversy between the City and the Head Estate.

As will appear, it is contended by the City herein, among other things, that the forms of warrants involved in this case are really bonds instead of warrants, and not having been authorized by any election, are void, and, furthermore, that even if said obligations are warrants, that the City has no legal power to finance the paving of its streets by the issuance of time warrants, but is confined to the use of bonds. It may be proper, therefore, at the outset, in a preliminary way to state that the identical form of warrant for many years has been in common use in Texas and other southwestern States as the usual and accepted form of warrant, and has been held and recognized by the courts of Texas to be a warrant. Also, for the past fifteen or twenty years it has been a very general custom and prac-

tice by cities and counties of Texas and other southwestern States, to finance many of their public improvements by the issuance of time warrants which do not require the sanction of an election. This has been specially true of street improvements in cities. In most southwestern towns and cities, street improvements on each particular street have been initiated by property owners' petitions. These property owners usually pay three-fourths or two-thirds of the cost of the pavement, and the City issues its warrants for the remainder of the cost. Obviously, it is highly impractical to hold an election to authorize bonds for the City's share of the pavement every time property owners initiate the pavement of a particular street, as the cost and trouble of an election, in most cases, would be disproportionate to the cost of the improvement. It is probably correct to say that in Texas, Oklahoma, Arkansas and Kansas a very large proportion of the outstanding public debt created for public improvements is evidenced by warrants and bonds issued without any vote of the people. In Texas the universal form of warrant is substantially identical to the form involved in this case. Undoubtedly each year, for many years, many millions of dollars of substantially identical warrants for divers of public improvements have been issued in Texas without the sanction of any election, as would be required for the issuance of bonds, and

these securities have been repeatedly sustained by the courts of Texas, and are now held in good faith by investors throughout the county who relied upon what, up to this time, has been accepted as the decided law of the State.

In view of the inaccuracies and omissions in the statements contained in the City's petition and accompanying brief, and in view of the discolored and distempered treatment of the record therein, the Brown-Crummer Investment Company will make its own statements from the record.

The suit was originally brought by the City of Gainesville in the District Court of Cooke County, Texas, on October 11th, 1921, against Southern Construction Company, Southern Surety Company, and H. W. Head. The validity of the warrants was not questioned by the City; on the contrary, the City sought a money judgment against the defendants above named on account of the alleged failure of the Construction Company to finish the job.

Thereupon, Head filed a pleading in which he alleged that the warrants in question were invalid and uncollectible, and that the City, therefore, had suffered no damages as a result of the contractor's failure to finish the job.

On December 10th, 1923, the City filed its First Amended Original Petition, making Brown-Crum-

mer Investment Company a party defendant for the first time, and even then the City alleged that the warrants constituted valid, legal and binding promises and obligation of the City, but, in the alternative, prayed that if said warrants were not valid, which the City denied, that the warrants be cancelled (Tr. 119-122).

It was not until February, 1926, and several years after Head first attempted to raise any question as to the validity of the warrants, that the City decided to co-operate with the Head Estate in trying to defeat the warrants, and then, for the first time, the City actually pleaded that the warrants are invalid, and prayed for their cancellation (Tr. 2-64, 115-116).

In the meantime, the City had voluntarily paid all principal and interest maturing on the warrants during the years 1921, 1922, and up to and including March 1st, 1923. (Tr. 175-176.)

In this belated attempt to repudiate its obligations, the City, in co-operation with the Head Estate, now advances various reasons for the alleged invalidity of the warrants. After the lapse of several years, skillful counsel have subjected the City's entire proceedings to minute microscopic scrutiny, and the following are the alleged infirmities they bring forth:

(a) That the City of Gainesville had no legal power to issue warrants for the payment of the

work, but was confined to the issuance of bonds as the exclusive method of financing available to it, and that it had no power to issue bonds without an election held authorizing same, and that the alleged warrants are really bonds anyway, and were issued without an election.

(b) That plans and specifications for the job had not been approved by the City Council before the contract was let.

(c) That no preliminary estimate of the cost of the proposed improvement was made before the contract was let.

(d) That the bids, after being opened, did not remain on file in the office of the Mayor for public inspection as much as forty-eight hours before any award was made.

(e) That after the award was made, and without re-advertising the job for new bids, the City reduced the amount of the construction bond required of the contractor to Five Thousand Dollars ($5,000.00), and did not require a Maintenance Bond to be given.

(f) That one-fourth (1/4) instead of one-third (1/3) of the cost of the improvement was to be paid for by the City, and that three-fourths (3/4) instead of two-thirds (2/3) was to be assessed against the abutting property owners, according to the provisions contained in the general conditions

and specifications attached to the contract between the City and the contractor.

(g) That no provision was made for paying anything but the City's share of the cost of the job.

(h) The principal point relied upon appears to be the contention that after the issuance of the warrants the contractor did not in fact altogether complete the job, but lacked some $15,000.00 worth of work of doing so, and that for that reason the City failed to receive full consideration for the warrants.

In its pleadings replying to these contentions, Brown-Crummer Investment Company denies the various facts alleged by the City of Gainesville and by the Head Estate, bearing on the alleged invalidity of the warrants, and denies the existence of said alleged infirmities, and denies the alleged invalidity of any of said warrants, and denies that it, the Brown-Crummer Investment Company, had any knowledge of any of the alleged facts or infirmities referred to in the pleadings of the City and the Head Estate.

Brown-Crummer Investment Company further pleaded with much detail and particularity that the City and the Head Estate caused Brown-Crummer Investment Company to pay its money for said warrants by such representations that they are each

now estopped to deny the validity of the warrants (Tr. 82-101). The defense of estoppel last mentioned, as will be shown, reaches each and all of the contentions urged by the City and the Head Estate.

## STATEMENT

### Events and Proceedings Before December 16, 1919

On September 16th, 1919, motion was carried that the City Engineer should prepare plans and specifications and advertise for bids. (Tr. 173.) The instructions to bidders disclose that at the time said instructions were issued, there existed plans and specifications obtainable at the office of the City Engineer (Tr. 133-134), and the same is again disclosed by the bid of Southern Construction Company (Tr. 134). Both the instructions to bidders and the bid further disclose that the contract was to be a unit price contract, and would, therefore, be applicable to any streets which the City might determine should be paved. The contract between the City and Southern Construction Company, dated November 20th, 1919, adopts and makes a part thereof said plans and specifications, and recites that a bond is thereto annexed.

It appears, therefore, that not only were plans and specifications prepared, but in the manner above mentioned they were approved by the Coun-

cil. Also, it appears that the construction bond was attached to the original contract. By supplemental contract a cash bond for $5,000.00 was substituted in lieu of the construction bond, and in consideration thereof the contractors agreed to accept warrants for the City's share of the work. (Tr. 138-140.)

Plaintiff's witness, F. M. Savage, merely testified that he had never been able to find the instructions to bidders and specifications except as contained in the contract. (Tr. 174.) He did not become City Secretary until the latter part of January, 1921. (Tr. 174.)

No witness in the case testified that plans and specifications for the job had not been prepared or were not approved. Certainly, there is no testimony that Brown-Crummer Investment Company knew same had not been done. There is no testimony that Brown-Crummer Investment Company knew that the bids, after being opened, had remained on file in the Mayor's office, open for public inspection only twenty-four hours instead of forty-eight hours before the award. There is no testimony in the record tending to show that Brown-Crummer Investment Company knew that the amount of the contractor's bond had been changed. Furthermore, the Charter leaves the amount of said bond to the discretion of the Council. The Charter does not require any Main-

tenance Bond to be taken at all, and there is no evidence in the record to show that Brown-Crummer Investment Company was aware that the general instructions and specifications attached to the original contract called for a Maintenance Bond, and there is no evidence in the record to show that Brown-Crummer Investment Company knew that a Maintenance Bond had been waived.

There is no evidence in the record to show that Brown-Crummer Investment Company knew how many times bids were advertised for, or that any changes or adjustments in any of the terms of the contract with the Southern Construction Company had been made after the contract was let.

There is no evidence in the record that no preliminary estimate of cost was in fact made, and certainly there is no evidence in the record to show that Brown-Crummer Investment Company was aware that none had been made. There is no evidence in the record to show that Brown-Crummer Investment Company was aware of any provision in the general instructions or specifications attached to the construction contract to the effect that the contractors should prefer certain classes of laborers; neither is there any evidence in the record to show that Brown-Crummer Investment Company knew what proportion of the cost of the job was being borne by the City and what proportion by the abutting property

owners. Indeed, there is no evidence whatever in the record to show that any representative of Brown-Crummer Investment Company had seen or was familiar with any of the acts or proceedings of the City Council prior to December 16th, 1919, or with the general instructions and specifications attached to the construction contract, in which, according to the City's contention, some of the foregoing preliminary points raised are disclosed. The latter were not set forth in the resolution of the City Council of date December 16th, 1919, and hence were not made known to Brown-Crummer Investment Company by the terms of said resolution. (Tr. 231-250.) Instead said resolution explicitly recites in detail that all necessary steps had been properly taken.

The witness R. E. Crummer testified that he was the active head of Brown-Crummer Investment Company, and that the transaction involved in this suit was handled under his supervision (Tr. 191); and he further testified: "I did not know what was in the contract between the City and the Construction Company." (Tr. 196.)

There is no evidence in the record that any representative of Brown-Crummer Investment Company saw or was aware of the contents of said general instructions and specifications attached to said contract. As will be shortly shown, none of the alleged infirmities above mentioned

are disclosed by the proceedings of the City Council on and after December 16th, 1919, upon which Brown-Crummer Investment Company relied in paying out its money.

The general instructions and specifications attached to the construction contract further disclosed that the liability of the City was, by the express terms of the contract, limited solely to one-fourth of the cost of all the paving, except the cost of street and alley intersections, which latter was to be paid wholly by the City. It was expressly stipulated in said contract that the City should not be liable for any other part of the cost of the job, and that the contractor should look alone to the property owners for their share of the cost of the work, and should hold the City harmless for the collection thereof, and that the City should not become liable for the property owner's share of the cost, or for the collection thereof, and should not even be required to pay any cost of the assessment proceeding against property owners, and that **in no event** should the City be liable for more than the cost of street and alley intersections, and for one-fourth of the rest of the paving. (Tr. 152-156.)

Plaintiff's witness A. M. Bell, admitted that the City's portion of the cost, including intersections, as above defined, would amount to one-third of the total cost, including intersections, as above de-

fined, would amount to one-third of the total cost of the job. (Tr. 178.)

**Events and Proceedings On and After December 16, 1919**

The first contact which Brown-Crummer Investment Company is shown to have had with the City's proceeding was the preparation on or about December 15, 1919, by Harris, McCall & Graham, attorneys for Brown-Crummer Investment Company, of the form of ordinance which was passed by the City Council on December 16, 1919. (Tr. 209-210.) Some days later, on January 2, 1920, said attorneys wrote to J. E. Blaine, then in the employ of Brown-Crummer Investment Company, calling attention to two clerical corrections which, in their opinion, should be made in the form of resolution, and the original of such letter was forwarded by Mr. Blaine to the City Secretary, requesting that the correction be made. (Tr. 210-212.) As a matter of fact, however, the corrections were never actually made, and the resolution remained in exactly the same form as it was originally passed (See resolution itself Tr. 231-250.) The reason why the form of said resolution was prepared by attorneys for Brown-Crummer Investment Company will appear shortly.

The original contract between Southern Construction Company and Brown-Crummer Invest-

ment Company for the purchase of the warrants stipulated that the Brown-Crummer Investment Company should pay the Southern Construction Company Ninety-five Cents ($.95) on the dollar for same. (Tr. 207-208.)

The witness, Lee Lewis, in substance testified that the time for doing the work under the original construction contract and the time it was contemplated the warrants should be delivered, had expired on account of rain beyond the control of Brown-Crummer Investment Company and of the City, and it was necessary to get an extension of time. (Tr. 216.)

The witness R. E. Crummer testified that the reason for the contract of June 18th, 1920, was because of the delay and the failure of the contractor from whom Brown-Crummer Investment Company had originally purchased the warrants, to deliver them within anything like the time contemplated. The witness Crummer further said:

> "The market had declined to an extent of probably ten per cent. during that period, so that someone was obliged to assume a very great loss on account of the big market decline that took place from the date of the original contract up to about this period." (Tr. 203.)

He further testified:

"It was my understanding that the City of Gainesville assumed some part of the responsibility for all this delay and they were anxious to get us to continue our commitment with the Southern Construction Company and offered us five per cent." (Tr. 205.)

The result was the contract on June 18th, 1920 (Tr. 205.) Said contract between the City of Gainesville and Brown-Crummer Investment Company required the entire issue of warrants, or so much thereof as might be necessary to pay for the work done or materials furnished should be issued within 100 working days from the date of the agreement, and the agreement provided:

"That for and in consideration of the legal proceedings, furnished for the issuance by the City of Gainesville to the Southern Construction Company of warrants in payment for work and materials furnished in the performance of a certain contract for street improvement between the said City of Gainesville and said Southern Construction Company and for the furnishing and printing of such warrants as well as all other matters incidental to the issuance of same—it being understood that said issue shall not exceed $50,000.00 in amount—the City of Gainesville agrees to pay an amount equal to five per cent. (5%) on all such warrants issued. The

above amount to be paid to the Brown-Crummer Company as said warrants are taken up by said company." (Tr. 206.)

Thus it happened that Brown-Crummer Investment Company finally paid 90c on the dollar for the warrants instead of 95c, as originally contracted for, and the undisputed evidence shows this to have been a very liberal arrangement on the part of the Brown-Crummer Investment Company, in view of the terrible decline which had taken place in the security market. It may be recalled that at that time United States Government Liberty Bonds were bringing about 85c on the Dollar.

Such is the basis for the implied charge contained in the City's brief that Brown-Crummer Investment Company had an unfair contract with the City.

Both the original contract for the purchase of the warrants made November, 1919, and the supplemental contract made on June 18th, 1920, contemplated that the proceedings for the issuance of the warrants should be subject to the approval of Brown-Crummer Investment Company's attorney and the latter contract most specifically obligated Brown-Crummer Investment Company, at its expense, to prepare appropriate pro-

ceedings from time to time. (Tr. 206-208.) The responsible attorneys and officials of Brown-Crummer Investment Company passing upon the purchase of the warrants lived at a distance; Harris, McCall & Graham, the attorneys, were located in Dallas, Texas; Mr. R. E. Crummer, the Executive Officer of the company in charge of the matter, was located at Wichita, Kansas, and the contracts above mentioned required the warrants to be delivered at Wichita, Kansas, and there paid for. It is common knowledge that it is the usual every-day practice for investment houses which purchase municipal securities in process of issuance, to furnish the municipality with such proceedings to be had as will be sufficient to satisfy all legal requirements, and to satisfy their own attorneys. Thereby the risk of the proceedings being defective or unsatisfactory is minimized. Surely, there is nothing sinister in such procedure. And so, it happened, as is customary, the attorney for Brown-Crummer Investment Company furnished the City with the forms of proceedings which would be required.

In its petition and brief the City makes the statement that no work had been done on the job when the last four estimates were made and warrants issued therefor. This is not true. All of the estimates were made and warrants issued,

as will shortly appear, during the year 1920. A great deal of work had been done and material furnished in that year. The evidence is as follows:

The witness, F. M. Savage, testified that some tarvia pavement on Dickson and Davis Streets had been done before January, 1921; he did not say how long before. He testified that the contractor did some brick paving after that. He did not testify that the excavation and preparation work for the laying of brick had not been done prior to that time, and he did not testify that there was no material on hand at the time the resolutions were passed. (Tr. 174-175.)

The witness, W. P. Springfield, testified that in 1920, the contractor did tarvia and liquid asphalt paving on Dickson Street and Davis Street and did excavation for brick paving, but that the brick was not laid until 1921. (Tr. 177.)

The witness W. L. Blanton testified that in 1920, paving had been done on Dickson and Davis Streets. (Tr. 180.)

The witness Buckingham testified that there was a time when there was considerable material on the ground, which was later moved away. (Tr. 187.) To the same effect see Tr. 218-19. There is no evidence that any tarvia or asphalt paving was done after 1920.

The record thus discloses that the tarvia and liquid asphalt paving called for by the contract were completed in 1920, and that during that year the excavation and preparation work for the laying of brick on that portion of the job to be paved with brick had been done, and it was only the laying of brick that did not take place until 1921. No witness undertook to testify what proportion of the job had been completed at the several times when the resolutions were passed, or that in fact work had not been done and material furnished at the time that any particular resolution was passed, to justify the issuance of the warrants thereby authorized. Furthermore, the evidence discloses that for a long time much material was on hand on the job, which was moved away, as will be hereafter shown, when late in 1921, the contractors moved off the job. There is nothing in the evidence to show that such material was not on hand when the resolutions were passed, and that same, together with the work then completed, did not then justify the issuance of the warrants authorized by the resolutions.

Sometime in 1921, the contractors were enjoined from completing the job, and said injunction was that year made permanent. The grounds of the injunction are not disclosed by the record. In obedience to this injunction, which

affected a substantial part of the job as a whole, the contractors stopped work. This happened in September, 1921. (Tr. 181-182.)

The plaintiff's witness, W. L. Blanton, further testified that the contractors were willing to go upon any other streets authorized by the City to finish out the quantity of work which their contract with the City contemplated, and they offered to do this, but the witness did not know why such an arrangement was not carried out. (Tr. 183-184.)

Thus, it appears that the contractors stopped work in obedience to an injunction, and only moved off the job after offering to do on other streets the quantity of work which they lacked of finishing the contract in question.

Yet, in the face of the foregoing undisputed evidence, the City seeks to convey the impression that at the time the various warrants were purchased and paid for by Brown-Crummer Investment Company, no work had been done on the job, and that as soon as the warrants had been finally delivered by the City, the contractors quit the job for lack of funds. The record is wholly without evidence to support such contention, if it were material.

R. E. Crummer was Vice President and active head of Brown-Crummer Investment Company,

and the transactions involved in this suit were handled under his supervision and instructions, and the money for the warrants was paid from time to time under his personal direction, and Judge W. M. Harris, of the firm of Harris, McCall & Graham, attorneys, of Dallas, Texas, was passing on the transaction for the Brown-Crummer Investment Company, and from time to time prepared the resolutions and documents above mentioned and sent them to the City by J. E. Blaine, as messenger, or otherwise, to be acted on in due course by the City. (Tr. 191-193, 257-261.) The City was well aware that Mr. R. E. Crummer, of Wichita, Kansas, in behalf of Brown-Crummer Investment Company, was in charge of the transaction and handled the matter of paying for said warrants at Wichita, Kansas, and that W. M. Harris was the attorney passing on the validity of the proceedings and warrants in behalf of Brown-Crummer Investment Company. (Tr. 263-266, 210-212.)

We come now to the proceedings of the City on and after December 16th, 1919. The resolution of December 16, 1919, is set forth verbatim in the transcript, pages 231-250. It recites and represents that the City Council theretofore had determined the necessity for the street improvements, and had entered into a contract for the construction of same in accordance with the plans

and specifications attached to the contract. It sets forth the Construction Company's unit price proposal and certain brief memoranda of agreements made on November 20th, 1919, but does not contain the general instructions and specifications. It further recites and represents that the contracts therein referred to are based on specifications prepared and submitted to and approved by the Mayor and City Council, and were let and entered into after proper advertisement inviting competitive bids, which advertisement was published as required by law for not less than ten days. It further recites and represents that the bids were kept open for public inspection in the office of the Mayor at least forty-eight hours after they were opened, and before the contract was awarded. It further recites and represents that the contractor had given a bond in accordance with Section 29 of the Charter of the City. Thereupon, the construction contract above mentioned is by said resolution in all things approved, ratified and confirmed, and it is provided at length that the City's share of the work should be paid for by the issuance of 6% warrants, payable to the contractor, its assigns, or bearer, principal and interest to be payable at the offices of Brown-Crummer Investment Company in Wichita, Kansas.

The resolution further authorizes and directs

that each of said warrants should carry the following recitations and representations, to-wit:

> "And it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuance of this warrant, have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation."

The resolution further provided that the warrants should be executed and delivered upon estimates accepted by the City, such delivery to be made only after inspection of material furnished and labor performed under said contract, and the acceptance of said material and work by the City Council. Here it should be noted that such estimates are not required to be made by the City Engineer.

Finally, the resolution further provided for a tax to pay the principal and interest of the warrants, and to create a Sinking Fund to retire same.

The warrants, when issued, were each in the form set forth in the above resolution, and contained the certificate and representations above authorized. (Tr. 250.)

The resolution above described was passed on December 16th, 1919, and, according to the evidence, is the first of the proceedings of the City which was seen by any representative of Brown-Crummer Investment Company.

On April 6th, 1920, the City Council passed a resolution allowing the first estimate in favor of the Southern Construction Company, contractor, amounting to $3,000.00, which resolution recited and represented that the Southern Construction Company had furnished material and performed labor on the job in the amount of $3,000.00, and that same had been inspected by the Council and accepted by the City to be in accordance with the contract, plans and specifications, and determined by the Council to be well worth the amount reflected in said estimate, and that the claim for said estimate had been duly audited and found to be correct, and had been approved. Thereupon, the resolution allowed the claim and estimate, and directed the delivery of warrants to the amount of $3,000.00 in payment thereof, and further recited and represented that the City of Gainesville had received full value and consideration for the warrants therein authorized to be delivered.

Said resolution of December 16th, 1919, with the resolution of April 6th, 1920, together with the three warrants authorized to be delivered,

were attached to the first draft presented to Brown-Crummer Investment Company at Wichita, Kansas, for payment, covering said three warrants; also, attached to said draft was an affidavit signed by the Mayor and all the Aldermen and City Secretary of the City of Gainesville, reciting in substance that the statements contained in the resolution of April 6th, 1920, are true and correct; that the work done and material furnished had been inspected by the Council and accepted and found to be in accordance with the contract, plans and specifications and well worth the price represented by the estimate, and that the City of Gainesville had received full value for the money represented by the warrants. Also, attached to said draft was an approving opinion of W. M. Harris.

All of these documents, with the three warrants, were forwarded to Wichita, Kansas, by H. W. Head, who was financially interested with Southern Construction Company on the job, and the draft, with such documents attached, was presented to Brown-Crummer Investment Company at Wichita, Kansas, for payment, as the City well knew and understood would be done. (Tr. 251-258.)

On September 21st, 1920, a resolution allowing the second estimate to the contractor, was passed by the City Council.

On October 5th, a resolution allowing the third estimate to the contractor was passed by the City Council.

On November 2nd, 1920, a resolution allowing the fourth estimate to the contractor was passed by the City Council.

On November 16th, 1920, a resolution allowing the fifth and last estimate to the contractor was passed by the City Council.

Each of the last four mentioned resolutions were substantially in terms and language identical with the resolution of April 6th, 1920, above described, and contained like recitations and representations. Each of said resolutions, from time to time was forwarded to Wichita, Kansas, and presented to Brown-Crummer Investment Company for payment, accompanied by and having attached thereto the warrants authorized to be issued by said respective resolutions, and affidavits in terms and language substantially identical with the affidavit accompanying the first draft, as above described, together with an approving opinion from W. M. Harris. (Tr. 258-260, 167-173.)

Each of the ordinances and resolutions above referred to was regularly passed by the City Council of the City of Gainesville on the respective dates above set forth. (Tr. 261.)

In due course, from time to time, the foregoing drafts as presented, with the foregoing documents attached, were paid by Brown-Crummer Investment Company, after R. E. Crummer in each of said cases had examined the warrants and documents attached to the drafts before actually paying the draft, and the undisputed evidence is that R. E. Crummer believed the recitations therein contained to be true, and relied upon them. (Tr. 261.)

Among the papers attached to each of said drafts were the warrants and coupons, for the payment of which drafts were drawn, and said warrants each contained the recitations and representations authorized in the original ordinance of December 16th, 1919, to the effect in substance that all acts, conditions and things required to be done precedent to, and in the issuance of the warrants, had been properly done, happened and performed in regular and due time, form and manner, as required by law. (Tr. 260-261.)

The genuineness of the signatures of the Mayor, Aldermen and officials of the City to the various resolutions, affidavits, etc., above mentioned, was duly proven. (Tr. 185.)

Plaintiff's witness, Buckingham, testified that he and the other members of the Council at the time they signed and passed the resolutions above mentioned, read the said resolutions and were

familiar with what they were signing, and always signed on the advice of the City Attorney of the City of Gainesville (Tr. 186-187.) He further testified that whatever was signed was the adoption of the Council and was signed as a member of the Council. (Tr. 186.)

The first suggestion as to escrowing any part of the warrants was not made until September 27th, 1920, in a letter from R. E. Crummer, Vice President of Brown-Crummer Investment Company to Harris & Graham, of Dallas, Texas, in which he said:

> "We believe our Mr. Moore suggested to either you or Mr. Blaine that if it was practical to arrange for the delivery of this entire issue to the American State Bank of this City at one time upon the understanding that the various installments would be approved and released to us only as the estimates were allowed, that it would be of quite an assistance to us in securing and holding our commitments on this issue, the delivery of which has already been delayed so long that some of our prospective purchasers have practically dismissed the subject from their minds. We can assure you that any assistance you may be able to render us to accomplish this end will be greatly appreciated." (Tr. 262-263.)

Thereupon, on October 1st, 1920, W. M. Harris,

of Harris & Graham, wrote to S. A. Bryan, City Secretary of the City of Gainesville, as follows:

"We have an inquiry from the Brown-Crummer Company of Wichita, Kansas, who are the purchasers of the warrants of your City, suggesting that an arrangement be made with your City for the delivery of all of the remaining warrants, to the American State Bank of Wichita, upon the understanding that the various installments will be approved and released to them as the estimates of the Contractor are allowed, stating that such an arrangement would be quite an assistance to them in securing and holding their commitments on this issue of warrants.

"It occurs to the writer that your City can well afforded to do this for the reason that the purchasers have sustained a loss on the purchase of this series of warrants, and that the City can afford to assist them to this extent, in order to enable them to hold commitments already made.

"Of course, this would necessitate the execution of all of these warrants by the Mayor, yourself and the City Treasurer and forwarding them to the American State Bank of Wichita, Kansas, with instructions to deliver them in installments as authorized by resolution of the City Council of your city. If such

an arrangement is satisfactory, please advise me and at the same time have warrants properly signed by the City officers and sealed with the City seal and forward same as above directed." (Tr. 264-265.)

In the meantime, the first and second drafts covering the warrants issued for the first and second estimates had been paid.

On October 12th, 1920, when the draft covering the warrants issued for the third estimate, amounting to $17,000.00, was presented to the Brown-Crummer Investment Company at Wichita, Kansas, R. E. Crummer wrote directly to the City Treasurer of the City of Gainesville as follows:

"We have today had presented to us $17,000.00 City of Gainesville, Texas, Street Improvement 6% Warrants, being the third installment delivered to the Southern Construction Company.

"We note, however, coupons aggregating $793.39 have been detached, which together with the 5% additional underwriting, makes a total of $1643.39 for which amount you will kindly remit us your check and promptly upon receipt of same, the draft of the Southern Construction Company will be honored.

"It is our understanding that arrangements

would be made with you whereby the entire issue of warrants could be executed and delivered to our bank to be released to us at such times and in such amounts as the estimates are hereafter allowed. On account of the long delay in the closing of this transaction, it would be very helpful to us in the sale of these securities to have this arrangement carried out if possible.

"Kindly let us hear from you by early mail, regarding the above, and greatly oblige." (Tr. 265-266.)

Apparently, so far as Brown-Crummer Investment Company knew, none of the warrants had been actually escrowed up to October 12th, 1920. In each of the foregoing letters, it will be noted that both W. M. Harris, the attorney for Brown-Crummer Investment Company, and R. E. Crummer, the executive head of Brown-Crummer Investment Company in charge of this matter, explicitly made known to the City that they expected the various installments to be approved and released only as estimates were allowed, and that the warrants were to be delivered to the bank at Wichita, Kansas, and released to Brown-Crummer Investment only at such times, and in such amounts as estimates should be thereafter allowed, as shown in the letter of October 12th, 1920, above mentioned. Mr. Crummer himself

made no other suggestion to his own lawyer, W. M. Harris.

Again, on October 30th, 1920, after the remaining warrants amounting to $20,000.00 had been escrowed, and after Head had apparently written to the American State Bank at Wichita, Kansas, that $10,000.00 of said warrants were to be taken up not later than November 5th, and the remaining warrants were to be taken up not lated than November 25th, R. E. Crummer wrote directly to Mr. Head emphasizing his understanding as above explained. The letter reads as follows:

> "We have your favor of the 27th inst. advising shipment of the $20,000.00 City of Gainesville, Texas Improvement Warrants to the American State Bank of this City, which shall be taken up according to the terms of our contract as and when the various installments are due the contractor which you will appreciate must be evidenced by proper legal proceedings.
>
> "We assume your letter of instructions to the American State Bank, in which it is stated that $10,000.00 are to be taken up not later than November 5th, and the remaining $10,000.00 not later than November 25th, is contingent upon the contractor having received

estimates within the times stated and are supplying us with this evidence.

"Any drafts drawn against us should be accompanied with complete legal papers, which the Southern Construction Company have heretofore furnished us, covering the various installments including final approving opinion of Judge Harris." (Tr. 266-267.)

The witness R. E. Crummer testified that pursuant to the letters above mentioned, the warrants were escrowed in the bank at Sherman, that is, the Merchants & Planters National Bank, with which H. W. Head was connected, and subsequently the remaining warrants were escrowed in the bank at Wichita, Kansas, pursuant to the terms stated in said letters. (Tr. 267.)

Plaintiff's witness, Lee Lewis, testified:

"Well, the reason the warrants were issued in advance of the work, according to the contract, they were to be delivered at a certain time and sold at a certain price, under the contract with the Southern Construction Co. and that time had expired on account of rain beyond the control of the Brown-Crummer Co. and the City of Gainesville and it was necessary to an extension of time, and we were advised by the city attorney, Mr. Adams, that those warrants could be issued—and by Hayden W. Head, at Sherman—that those war-

rants could be issued and could be delivered at the proper time and they were issued at that time by the city council and were supposed to be held by Mr. Head. They were to be placed in escrow with Mr. Head. * * * It is not my understanding that the warrants should be turned over to the Southern Construction Co. They were not entitled to the warrants. They were to be held in escrow. Mr. Head was supposed to be responsible for those warrants as well as the surety company bond back of them. All the council should have known at that time of the passage of those resolutions the work hadn't been done. I knew it. * * * * I think it was the intention to deliver the warrants as the work progressed. However, the city attorney advised that they ought to be issued as such had been done in different cases. The Plan was to deliver the warrants as the work progressed and certificates were given by the Council and engineer that the work had been done." (Tr. 216-217.)

At the time of thus escrowing said remaining warrants, the City protected itself by procuring indemnity agreements and bonds from H. W. Head, Southern Construction Company and Southern Surety Company. (See Tr. p. 12-17.)

These indemnity agreements and bonds were

taken to protect the City against any loss should the warrants be finally released to Brown-Crummer Investment Company without the consent of the City.

The witness, R. E. Crummer, testified:

> "I live in Wichita, Kansas. I am Vice President of the Brown-Crummer Company, and was Vice President in 1919, 1920 and 1921. I am the active head of the company. * * * * The transaction was handled under my supervision. * * * * In case of each of these five drafts, I examined the papers attached at the time they reached Wichita, Kansas, and before actually paying the draft. I believed the recitations contained in the papers to be true and relied upon them. If I had known of any infirmities in any of these warrants I would not have paid for them." (Tr., 191-193.)

The City in its petition and brief asserts that R. E. Crummer and Judge W. M. Harris, of Dallas, the attorney of Brown-Crummer Investment Company, and J. E. Blaine, a salesman of the company, each knew of the infirmities claimed, and particularly that the warrants were issued without an equivalent amount of work having been done. These statements are without foundation in the evidence. Judge W. M. Harris was located in Dallas, Texas, and R. E. Crummer was located in Wichita, Kansas, at the time of these

transactions. (Tr. 190-191.) There is not a syllable of evidence in the record indicating that either Harris or Crummer were ever in Gainesville, Texas, or were informed by anyone as to the existence of any of the alleged infirmities, or were informed by anyone that at the time the warrants were delivered to and paid for by Brown-Crummer Investment Company, an equivalent amount of work had not been done. There is not a syllable of evidence anywhere in the record indicating that either Harris or Crummer had any information from any source that any of the recitations and representations in the delivery documents accompanying the drafts were untrue.

J. E. Blaine was an employee of Brown-Crummer Investment Company, whose duty it was to locate prospective municipal issues of securities, and on specific authority in each particular instance, to negotiate a purchase of same. He did not have authority to make any contract without specific authority in the particular instance after submitting the matter to the company. (Tr. 191.)

Blaine negotiated the original contract for the purchase of the warrants from Southern Construction Company November, 1919, under specific instructions from the company. He had no authority to purchase warrants except upon specific authority in each specific transaction. He

had no authority to change any contract without specific authority. (Tr. 204.)

The amended purchase contract between Brown-Crummer Investment Company and the City of Gainesville was entered into under the authority of specific wires passing between Blaine and Crummer, which wires are shown at Tr. p. 203.

It will be noted that Blaine in his wire to Crummer, dated June 17th, 1920, and before any of the disputed estimates were made, stated to Crummer: "Work commences right away in earnest." Up to that time only the first $3,000.00 estimate had been made, and there is no contention that such estimate was not supported by an equivalent amount of work.

Blaine worked on a salary of $200.00 or $250.00 a month. He never received a commission. Judge Harris looked after this transaction until it was completed. Blaine ceased to be in the employ of Brown-Crummer Investment Company on or about September 1st, 1920. (Tr. 195, 197, 204.) Blaine was used as a messenger several times to bring papers which had been prepared by Judge W. M. Harris, at Dallas, to Gainesville, for Council meetings, and after he left the employment of Brown-Crummer Investment Company, Mr. Crummer used Blaine as a matter of courtesy and accomodation in connection with the 5% adjustments on the price of the warrants called for by the contract

of June 18th, 1920, on account of the fact that Blaine was familiar with the deal, and the City made out some of the adjustment checks to Blaine, even though in several letters the Brown-Crummer Investment Company had written the City to remit such checks to them. Blaine, of course, in due course endorsed these little adjustment checks and forwarded them to Brown-Crummer Investment Company. (Tr. 195, 197, 198, 199, 213, 214.) As a matter of fact, these 5% checks were made by the City at times to Blaine and at times to Brown-Crummer Investment Company interchangeably. (Tr. 214-215.)

There is no evidence in the record that Blaine at any time was told by anyone, or knew that when the various warrants were finally delivered to Brown-Crummer Investment Company and paid for that an equivalent amount of work for same had not been done. The only evidence in the record is that Blaine was present at some of the Council meetings at which such estimates were allowed. These meetings took place at night, when the Council meetings were regularly held, and there is no evidence that Blaine was ever in Gainesville during the period in controversy in the day time, or that he viewed, inspected or saw the progress of the job even on the occasion of any of these night visits. Neither is there any evidence that if Blaine had looked at the job on such night visits he could have formed any

opinion, or was qualified to form any opinion as to whether the job had progressed to a point justifying any particular estimate. One or two of the witnesses **presume** that Blaine must have known that the various estimate were not supported by an equivalent amount of work because of his presence at some of the night meetings as aforesaid. **This presumption on the part of one or two of the witnesses is the sole basis of the City's contention that Brown-Crummer Investment Company was aware of any alleged infirmities in the warrants.** (Tr. 218, 184, 186). For a time there was a lot of material on hand that was later moved away. (Tr. 187, 218). Brown-Crummer Investment Company never received any report or information from Blaine that the warrants were being handled in a manner other than that outlined in the letters introduced in evidence. (Tr. 205). Said letters are set forth in the transcript at pages 262-267, and disclose that the City received both from Judge W. M. Harris and from Mr. Crummer, who were Blaine's superiors, the most explicit statements that Brown-Crummer Investment Company expected and understood that the warrants would be released from escrow and paid for only as and when estimates were issued for labor done and material furnished.

The City knew from the beginning of the trans-

action that W. M. Harris was passing upon the validity of the warrants from time to time in behalf of Brown-Crummer Investment Company, and that Mr. Crummer was handling the transaction for Brown-Crummer Investment Company at Wichita, Kansas, where the warrants were being paid for in accordance with the terms of the purchase contract. The City further knew that both Mr. Crummer and Mr. Harris were Blaine's superiors, and, as above stated, the City had direct and explicit statements in said letters from both Harris and Crummer as to the basis, understanding and conditions upon which Brown-Crummer Investment Company was paying for the warrants from time to time.

## ARGUMENT

As may be seen from the list of points raised by the City, set forth at the outset of this brief, most of said points are in the nature of alleged procedural irregularities. Before coming to the more fundamental aspects of the case, we desire first to submit certain preliminary special comment on these alleged irregularities.

## PRELIMINARY COMMENT ON CERTAIN ALLEGED IRREGULARITIES

1. The City contends that plans and specifications for the job had not been approved by the

City Council before the contract was let. As a matter of fact, however, the proceedings of the Council prior to December 16th, 1919, clearly show that plans and specifications had been prepared and were in existence, and were attached to the instructions to bidders, and also attached to the contract made with the Southern Construction Company. And the action of the City Council in advertising for bids on the basis of said plans and specifications, and the action of the City Council in incorporating said plans and specifications into the instructions to bidders and in making the contract with Southern Construction Company, of which contract said plans and specifications were a part, constituted abundant approval of said plans and specifications. (Tr. 173, 133-134).

2. The City contends that no preliminary estimate of the cost of the proposed improvement was made before the contract was let. Article 1083 of the Revised Statutes of Texas does not require such estimate to be made by the City Engineer, but permits the estimate to be made by the "City Engineer or by some other Officer of the City, or by a Committee of Aldermen." As a matter of fact, there is no evidence in the record that no preliminary estimate of cost was in fact made. The witness, F. M. Savage, (Tr. 175), testified that he had been able to find no estimates on file

made by the Engineer in reference to the several estimates allowed from time to time by the City Council. This, of course, has no reference to the preliminary estimate of cost. There is nothing in the record to show that such preliminary estimates of cost was not made either by the City Engineer or by some other Officer of the City, or by a Committee of Aldermen, and the presumption of law is that the City Officials did their duty.

3. The City claims that the bids did not remain open on file in the office of the Mayor for public inspection as much as forty-eight hours before the award was made. It seems to be true that such bids thus remained open for public inspection for only twenty-four hours instead of forty-eight hours.

4. The City claims that after the award was made, and without re-advertising the job for new bids, the City reduced the amount of the construction bond required of the contractor to $5,000.00, and did not require a Maintenance Bond to be given; and it is argued that the City Charter requires a bond to be taken from the contractor in the amount of the cost of the job. As a matter of fact the City Charter leaves the amount of the bond entirely to the discretion of the City Council. Also, it appears that a bond was actually taken from the contractor, and the contract between

the City and Southern Construction Company, dated November 20th, 1919, recites that a bond is thereto annexed, and there is no evidence that such bond was not thereto annexed. It seems, however, that a supplemental contract was made between the City and the Construction Company, whereby, in consideration of the contractor agreeing to accept warrants for the work, the City agreed to reduce the amount of the bond to be required of the contractor to $5,000.00, and a deposit of $5,000.00 in Liberty Bonds was taken in lieu of such bond. It certainly was within the discretion of the City Council to accept a $5,000.00 bond if it saw fit to do so. The Charter does not require any Maintenance Bond to be taken at all, and the City Council, therefore, had a right to waive the requirement of the Maintenance Bond in consideration of the contractor's agreement to take long time warrants for the work.

5. The City contends that the consideration contract required the contractor to give preference to certain classes of laborers. Such a provision appears to have been included in the construction contract.

6. The City contends that according to the provisions contained in the general conditions and specifications attached to the construction contract, one-fourth instead of one-third of the cost

of the improvement, besides the cost of intersections, was to be paid for by the City, and that three-fourths instead of two-thirds was to be assessed against the abutting property owners. It seems to be true that such provisions were contained in said general conditions and specifications. It will be observed, however, that the City can hardly be heard to complain that it was required to pay a smaller proportion of the cost of the improvement than the Charter contemplated. As to the abutting property owners, there is no evidence that any of them have ever complained because they were required to pay a larger proportion of the cost than the Charter contemplated. On the contrary, the evidence is that all of the assessment certificates against the abutting property owners have been paid. The only party complaining is the City, and it is in the attitude of complaining that it is required to pay less than the proportion it should have borne.

7. In the same connection, the City further contends that the entire proceedings are void because no provision, as required by the Constitution and statutes of Texas, was made for the payment of that part of the cost of the job chargeable to the abutting property owners. This contention assumes that that portion of the cost of the job chargable to abutting property owners is an indebtedness of the City, and further assumes

that the issuance of assessment certificates against abutting property owners is not a sufficient provision for the payment of such indebtedness. Both of these assumptions are unsound. The facts in this case are that the City became liable only for its one-fourth of the cost, plus the cost of the intersections, and no part of the remainder of the cost ever constituted a debt of the City. The construction contract emphatically provided that the contractor should not have the right to look to the City for any part of the cost of the job except the one-fourth plus the cost of intersections, and that in no event should the City be liable for any other part of the cost or even for the cost of the assessment proceedings necessary to fix the liability of abutting property owners and that the contractor should look alone to the abutting property owners for the remaining cost of the job. Thus, by the terms of the contract **the portion of the job chargeable to abutting property owners never became a debt of the City, and hence it was not necessary for the City to make provision for the payment thereof.**

In the event the City were legally liable for the entire cost of the job and merely had the right to reimburse itself for a part of the cost by assessing same against abutting property owners, it has been decided in Texas that a bona fide attempt by the City to take appropriate proceed-

ing to assess abutting property owners their part of the cost of the improvement, is a sufficient provision for the payment of the indebtedness within Section 5, Article 11 of the Constitution and statutes of the state. And such proceedings have been held a sufficient provision for the payment of such indebtedness, even though some of the asesssments turned out to be uncollectible.

See:

City of Beaumont vs. Masterson, 142 S. W., 984.

City of Corsicana vs. Mills, 235 S. W., 225.

It follows from what has been said under the facts of this case the property owners' share of the cost was not a debt of the City, and it was not necessary for the City to make any provision for the payment thereof, so far as the requirements of the Constitution and statutes of the State are concerned, and even if were such a debt, the proceedings taken by the City to assess abutting property owners would constitute a sufficient provision for the payment of such debt.

Each and all of the contentions of the City above enumerated are based upon alleged irregularities in the proceedings of the City Council prior to December 16th, 1919. There is not a syllable of evidence in the record indicating that the Brown-Crummer Investment Company, or

any representative of the company, saw any of said preliminary proceedings, or that they, or any of them, were aware of any of said alleged infirmities. No proceedings of the City Council earlier than the resolution of December 19th, 1919, are shown by the City ever to have been seen by any representative of Brown-Crummer Investment Company until years after all of the warrants had been finally delivered and paid for.

We shall have occasion to refer again to the above mentioned miscellaneous contentions of the City in connection with the more important aspects of the case to which we now come.

## THE SECURITIES ISSUED ARE WARRANTS, NOT BONDS

The contention that the securities involved in this case are really bonds instead of warrants, and that they were issued without holding an election to authorize same, and are, therefore, void, has heretofore been definitely settled by the courts of Texas.

In Lasater vs. Lopez, 202 S. W. 1039, 217 S. W. 377, the securities involved were substantially identical in form to those involved here, and the contention was made that they were really bonds. The Supreme Court of Texas held that where the intention of the governing body of the municipal-

ity was to issue warrants, the instruments issued are warrants, even though they have some of the characteristics of bonds. Judge Phillips used the following language:

> "The instruments issued by the Commissioners' Court to White cannot be held to be bonds. They have possibly some of the characteristics of bonds, but that does not make them bonds. Their controlling features are those of warrants. That interest coupons were attached to them, as is ordinarily the case with bonds, is not determinative of their nature. The notes attacked in City of Tyler vs. Jester, 97 Tex. 344, 78 S. W. 1058, and which it was contended were essentially bonds, also bore interest coupons. The court recognized that they had some of the characteristics of bonds, but, with the city empowered to issue notes and the evident intention being to issue nothing else, it was held that such intention should not be denied but ought to be given effect. That decision governs this feature of the case. Under the jury's verdict, conclusive here upon the issues of fact, the intention of the Commissioners' Court was to issue only warrants, and it had no purpose to circumvent the laws governing the issuance of county bonds through the use of a device. The instruments issued were as much like warrants as bonds.

In our opinion, they more resemble warrants. The Commissioners' Court had the power to issue warrants. Its intention to do so, with the instruments having essential features of warrants, should be sustained rather than thwarted."

Substantially identical instruments were held to be warrants also in the following cases:

Payne, et al, vs. First National Bank of Columbus (Commission of Appeals, approved by Texas Supreme Court), 291 S. W. 209;

City of Tyler vs. Jester, 97 Texas, 344;

Graves vs. M. Griffin O'Neal & Sons, 189 S. W. 778;

Slayton & Company vs. Panola County, 283 Fed., 330;

Branch vs. City of Sour Lake, 6 Fed. (2nd) 655, 9 Fed., (2nd), 971.

In each of the foregoing decisions it is held that instruments substantially identical to those issued in this case are warrants when the municipality intended to issue warrants and took the steps necessary therefor, regardless of the form of the instruments and the fact that they contained some elements of bonds. Other cases in which substantially identical instruments are recognized as warrants are:

Grimes County vs. W. M. Slayton & Co., 262 S. W., 209.

Bridges vs. The City of Lampasas, 249 S. W. 1085.

Stratton vs. Commissioners Court of Kinney, 107 S. W. 1170.

Commissioners Court vs. Nichols, 102 S. W. 37.

Allen vs. Abernathy, 151 S. W. 37.

Therefore, by the foregoing cases, it should be no longer a question in Texas that the instruments involved in this case are warrants. All of the proceedings of the City of Gainesville in this case plainly manifest an intention on the part of the city that such instruments should be warrants.

For many years such form of warrants have been the usual and accepted form issued by the municipalities of Texas and commonly in circulation in the securities market throughout the country. Many millions of dollars of such warrants are now held in good faith by investors who relied upon what, up to this time, has been accepted as the decided law of this State and a settled doctrine in its commercial jurisprudence. The contention of the City to the contrary is evidently based upon a very recent decision of one of the intermediate courts of this State, to-wit, the Fort Worth Court of Civil Appeals, in Pulte vs. Keel, Mayor et al., 297 S. W. 241, and

another decision of the same intermediate court, to-wit, the case of J. M. Childers, et al, vs. R. E. Sheppard, et al, —— S. W. ——, following the first decision above mentioned. The last decision was just rendered on December 3, 1927.

In these cases the Fort Worth Court of Civil Appeals held such form of warrants to be really bonds requiring the sanction of an election to authorize their issuance. This holding, however, was made apparently without any consciousness whatever of the existence of previous contrary decisions of the Supreme Court of this State and other courts of this State. The opinion of said Court of Civil Appeals nowhere refers, directly or indirectly, to any of such pre-existing authorities, and when such pre-existing authorities were properly called to the attention of the Supreme Court of this State upon motion for rehearing upon application for writ of error, the Supreme Court granted a rehearing in the case of Pulte vs. Keel, supra, and said case is now pending before the Supreme Court of this State. There is every reason to assume that the Supreme Court of Texas will correct the unconscious departure made by the Fort Worth Court of Civil Appeals from the settled law of the State.

## THE CITY'S POWERS

The contention that the Gainesville charter does

not authorize the City to finance public improvements by the issuance of time warrants, and that the City is confined to the issuance of bonds as the sole method of financing such improvements, is likewise indefensible either on reason or authority.

This contention is based upon Article IV, Section 1, of the charter, which reads substantially as follows:

> "The City Council of the City of Gainesville shall have the power and authority*** to borrow money on the credit of the City*** for the permanent improvement of the streets ***paving and repaving of streets**; and the Council may issue bonds for the City of Gainesville for all or any of the above purposes, etc."

The theory is that the specification of the method "the Council may issue bonds, etc." excludes all other methods of financing any character of public improvement therein mentioned. In said Article IV, Section 1, the power to pave streets on the City's credit is first conferred unqualifiedly. Then follows the clause that the Council may issue bonds. This clause is separated from the first clause by a semi-colon, and there is no language in the section which confines the City to the use of bonds exclusively. If the section is to be construed as confining the City

to that one method of financing, that must be done by implication. Of course, it is always a question of legislative intention whether it was the purpose of the Legislature in authorizing a municipality to do a thing and specifying a particular method by which it may be done, to exclude all other methods of doing the thing and to prohibit the municipality from using any other appropriate method.

Here again the City's contention is based upon the case of Pulte vs. Keel, supra, and authorities therein cited. In the cases cited by the Fort Worth Court of Civil Appeals, however, it will be noted that in each instance the Court construes it to be the intention of the Legislature in that particular case to withhold from the municipality the authority to use any other method than that specified. For illustration we will refer to the decision which said Court urges as its strongest and clearest authority, to-wit: Foster vs. City of Waco, 113 Texas, 352. In that case the City of Waco bought 200 acres of land for cemetery purposes, and in part payment for same executed its nine promissory **negotiable** notes, each for $5,000.00. The power of the City to issue the notes without the question ever having been submitted to the voters was challenged. The Waco charter authorized the Board of Commissioners to create debts payable other than out of current

revenue in two ways, first by the issuance of bonds upon the vote of the people; second, by the creation of a "deficit" in a limited amount payable out of the current revenue for the next succeeding year. Another provision declares in substance that in the event the revenues of the City for any one year should not be sufficient "to meet the legitimate expenditures", the Board of Commissioners may incur a deficit over and above the revenues to the extent of $50,000.00, **and no more,** the excess, if any, over the amount being "absolutely null and void." The time and manner for paying the excess of "legitimate expenditures" over the revenue is prescribed as follows:

> "It shall be the duty of the Board of Commissioners to include the amount of such deficit in its budget of expenses to be provided for at the next succeeding tax levy, and the City Auditor shall include the same in the estimate which he is required to furnish to the Board of Commissioners annually of all the revenues and expenses from which such budget is made, **and said Board shall fix a rate of taxation for said year sufficient to pay off and discharge said deficit,** as well as meet the estimated current expenses of said year."

The City in issuing the notes levied taxes only in an amount sufficient in each year to pay off the principal of one of the notes and interest on

all of them. The Court pointed out that the purchase of the cemetery is a "legitimate expenditure" within the meaning of the charter, and hence was governed by the deficit provision above mentioned, which contemplated that the Board of Commissioners must incur the deficit in the manner specified in the charter, and to that extent and no more, and the charter expressly provides that the excess, if any, over that amount is absolutely null and void.

In view of the emphatic provisions of the charter above referred to, it was held that the City of Waco had power to employ only two methods in providing for the payment of the cemetery, to-wit, either by issuing bonds, under Article 202, or by incurring a deficit as outlined in Article 211. In other words, **under the phraseology of that particular charter,** a specification of said methods was held to exclude others, and the Court summarized its decision as follows:

> "That the mere grant of authority to purchase cemetery grounds **in view of the other articles of the charter referred to by us,** does not carry with it by implication the power of incurring a debt running over a series of years evidenced by notes as in this case."

It might also be added in passing, that the notes issued were **negotiable** notes, and it is a well settled

rule of charter construction that the power to issue negotiable obligations will not be implied, and that familiar rule of construction would alone have been sufficient to take care of the Waco case.

The principle of the Waco case, however, cannot be conceivably applied to the case at bar because the charter of the City of Gainesville is radically different from the Waco charter, and there are provisions in the Gainesville charter which absolutely preclude the application to it of the rules of construction contended for by the City. In one of the opening sections of the Gainesville charter, to-wit, Article II, Section 3, the following vitally important provision appears:

> "That the **specifications of particular powers shall never be construed as a limitation upon the general powers herein granted;** it being intended by this Act to grant to and bestow upon the inhabitants of the City of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter, etc."

Thus, at the very outset of the Gainesville charter the Legislature has solemnly declared that in construing said charter the specification of particular powers shall never be construed as limita-

tion upon the general powers therein granted. In other words, the Legislature has expressly forbidden the application to the Gainesville charter of the rule of construction contended for by the City in this case. Plainly, therefore, the specification of the power to issue bonds in Article IV, Section 1, of the Gainesville charter cannot be construed to limit the general power of the City to pave streets on its credit. This general power is conferred and emphasized in a number of sections of the charter.

In Article II, Section 1, the City of Gainesville is given general power to contract and be contracted with.

In Article II, Section 5, it is given the exclusive power and control over streets, etc., and to pave its streets, etc. (Tr. 230).

In Article III, Section 1, it is given the general power to levy taxes for general purposes (Tr. 230).

In the first clause of Article IV, Section 1, it is given general power on its credit to pave its streets (Tr. 128).

And then in Article IX, Section 16, in addition to the powers already mentioned, the City is given the following further powers in substantially the following language:

> **"In addition to the other powers of the City Council herein mentioned,** *** is invested with full power and authority to pave or otherwise improve any street****".

And then follows an adoption of Articles 544-547 of the 1911 Revised Statutes of Texas for certain purposes, but among those purposes is not included the method by which the City may finance its share of the cost.

The Gainesville charter, therefore, repeatedly confers upon the City Council the broadest powers to pave and improve its streets on its credit. Nowhere does said charter suggest that the City shall be confined to the issuance of bonds in financing such improvements. The charter itself says in the most decisive language that the specification of a particular power shall never be construed as a limitation of the general powers conferred by the charter. **It is well established that municipal corporations are invested by implication with the power to contract on the general credit of the City with respect to such improvements as they are authorized to make.**

City of Galveston vs. Looni, 54 Texas, 517.

City of Galveston vs. Heard, 54 Texas, 420.

Graves vs. M. Griffin O'Neal & Sons, 189 S. W. 778.

Briddle vs. City of Terrell, 82 Texas, 335.

City of Terrell vs. Dessaint, 71 Texas, 770.

Police vs. Britton, 21 L. Ed. 251.

Cleburne County vs. Brooks, 28 L. Ed. 470, 111 U. S. 400.

Allen vs. Lafayette, 8 So. 30.

Hoffman vs. Pawnee County, 41 Pac. 566.

It is also well established in Texas that a city has the right to pay for improvements which it is authorized to make **by issuing time warrants** to evidence its indebtedness therefor.

Bridges vs. City of Lampass, 249 S. W. 1083.

First National Bank vs. City of North Pleasanton, 257 S. W. 609.

City of Corpus Christi vs. Wassener, 58 Texas, 462.

City of Tyler vs. Jester, 74 S. W. 359, 78 S. W. 1058.

Noel vs. City of San Antonio, 33 S. W. 263.

The same doctrine applied to counties is established in the following cases:

Grimes County vs. W. L. Slayton & Co., 262 S. W. 209.

Lasater vs. Lopez, 110 Texas 179.

Stratton vs. Kenney County, 137 S. W. 1170.

Allen vs. Abernathe, 151 S. W. 349.

San Patricio County vs. McClane, 59 Texas, 248.

Cowan vs. Dupree, 139 S. W. 887.

There being in the Gainesville charter no express prohibition of the use of warrants, the foregoing decisions incontestably establish the right of the City to finance street paving by the use of time warrants. Thus, the existence of such general power in the City of Gainesville is beyond the domain of doubt.

The City and the Head Estate profess to perceive great danger in this power. They say that the exercise of this power to an "unlimited amount" without authority of the voters might lead to the greatest abuse of official discretion. If there were anything in this argument, it should be properly addressed to the Legislature. However, there is nothing in the argument because although the City has the power to issue warrants, it has not the power to issue them "to an unlimited amount". There are familiar constitutional and statutory limitations upon the power of a city in Texas to incur debts and levy taxes. These general limitations establish the boundaries within which the power to issue warrants must be exercised. There is, of course, no evidence and no pretense that the City of Gainesville in this case has exceeded any of these limitations.

The holding of the Fort Worth Court of Civil

Appeals, in Pulte vs. Keel, supra, like its holding about the form of the warrants, is in direct conflict with the foregoing previous decisions in this State, including some by the Supreme Court of this State, upon which decisions above mentioned the municipalities of this State, as well as investors throughout the country, have long relied. None of such previous decisions are mentioned in the opinion of the Fort Worth Court of Civil Appeals, and so far as may be gathered from its opinion, said Court appears not to have been conscious of the existence of such former decisions. And, as above mentioned, a rehearing has been granted by the Supreme Court of Texas upon application for writ of error in said case of Pulte vs. Keel, supra, and the same is now pending before said Supreme Court of this State. As a matter of fact, there are numerous cities in Texas having charters substantially identical to the Gainesville charter. Indeed, the Gainesville charter in respect to the features involved in this case, is the usual and normal charter prevailing in Texas, and for many years such cities have been financing divers public improvements by issuing time warrants in substantially the identical form involved in this case, and have been doing so in reliance upon what has long been regarded as the settled and decided law of the State.

## ESTOPPEL

Thus, we have seen that the City of Gainesville is invested with the general fundamental power to issue time warrants for street paving. But the City claims that certain irregularities exist in the manner in which that power has been exercised in this particular case. These criticisms do not relate to the existence of the power, which we submit undeniably exists, but relate rather to the manner of its exercise, and to the circumstances under which it was exercised. Furthermore, in each instance the alleged existence of the irregularity is in its nature a **fact** matter, and is, therefore, a matter upon which, as we shall see, the City may estop itself by its representations. Thus, it may be a fact, or it may not be a fact that the plans and specifications for the job had not been approved by the City Council before the contract was let; it may be a fact, or it may not be a fact that no preliminary estimate of cost was made before the contract was let; it may be a fact, or it may not be a fact that the bids did not remain open to public inspection forty-eight hours before the award was made; it may be a fact, or it may not be a fact that after the award was made, and without readvertising the job for new bids, the City reduced the amount of the construction bond and waived the maintenance bond; it may be a fact, or it may not be a fact that the construction

contract required the contractor to prefer certain kinds of laborers; it may be a fact, or it may not be a fact that the construction contract stipulated that the City should pay one-fourth instead of one-third of the cost, and the property owners two-thirds instead of three-fourths thereof; it may be a fact, or it may not be a fact that the City made no provision for paying for a certain part of the cost of the job; it may be a fact, or it may not be a fact that at the time some of the estimates were approved, and warrants finally delivered, a sufficient amount of work and material had not been done and furnished to represent such warrants. **It may even be a fact, or not a fact, whether an election had been held to authorize the issuance of the obligations.** In other words, each and every one of said points raised by the City is in its nature a fact matter. It does not import a total want of power on the part of the City, under any circumstances, to issue these obligations for paving, but imports merely that an existing and undoubted power has been irregularly exercised or exercised under improper circumstances.

This brings us to the important and well established doctrine which is decisive of this case, even if it be assumed that each and every one of the above enumerated defects existed in the proceedings. As we shall show by overwhelming authority, it is sound and settled law that if **under any**

circumstances the City has the general power to issue such obligation for paving, and the City represents that such circumstances in fact exist, and the buyer of the obligations relies upon such representations, the City is estopped to deny the truth of the representations when sued by the buyer.

Before coming to the authorities, let us review the representations made by the City in this case. The City knew that the warrants were to be delivered at Wichita, Kansas, and there paid for by Brown-Crummer Investment Company. The warrants were made payable to Southern Construction Company, its assigns or bearer, and therefore, contemplated on their face that they would pass from hand to hand. In the resolution of December 16th, 1919, the first of the City's proceedings which, according to the evidence, were brought to the knowledge of Brown-Crummer Investment Company, the City represents explicitly that the City Council had theretofore determined the necessity for the street improvements, and had enterd into a contract for same in accordance with the plans and specifications which are recited to be attached to the contract, and that the contract is based on specifications theretofore prepared and approved by he Mayor and City Council, and was let after proper advertisement, as required by law, for not less than ten days, and that the bids

were kept open for public inspection in the office of the Mayor at least forty-eight hours after they were opened, and before the contract was awarded, and that the contractor had given a bond, in accordance with Section 29 of the City Charter. And then the resolution specifically authorized that each of the warrants should carry the following recitations and representations, to-wit:

> "And it is hereby certified and recited that all acts, conditions and things required to be done precedent to, and in the issuance of this warrant, have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that this warrant, does not exceed any constitutional or statutory limitation."

Said resolution further provided that the warrants should be delivered upon estimates accepted by the City after inspection and acceptance of the labor and material performed and furnished by the City Council, and not by the City Engineer. Pursuant to the above authority, the warrants actually issued each carried on their face the representations above quoted. As each of the estimates was later approved on April 6th, 1920, September 21st, 1920, October 5th, 1920, November 2nd, 1920, and November 16th, 1920, a resolution on each of said dates was adopted by the City Council in which it was further represented

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error this 28th day of June, 1926.

F. A. King, Clerk.

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co., et al. Writ of Error. Filed 28th day of June A. D., 1926. F. A. King, Clerk. By ..... Deputy.

**Citation in Error.**

*United States of America.*

*Fifth Judicial Circuit, ss.*

*The President of the United States,*

*To Brown-Crummer Investment Co., a corporation, Southern Surety Co., a corporation, and H. O. Head, executor, and Elex F. Wiseberg, F. C. Dillard and John T. Sugg, their attorneys of record, Greeting:*

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be held at the City of Fort Worth, in the State of Texas, in said Circuit, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern District of Texas, wherein the City of Gainesville, a Texas municipal corporation, is plaintiff, and Brown-Crummer Investment Co., Southern Surety Co. and H. O. Head, executor are defendants, to show cause, if any there be, why the judgment rendered

against said the City of Gainesville as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. H. Taft, Chief Justice of the United States, this 28th day of June A. D. 1926, and of the independence of the United States the one hundred and fiftieth year.

W. L. Estes,
*United States District Judge.*

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co., et al. Citation. Filed 28th day of June A. D., 1926. F. A. King, Clerk. By ....., Deputy.

**Praecipe for Transcript.**

*In the District Court of the United States for the Eastern District of Texas, Sherman Division.*

***No.* 241.**

*City of Gainesville,*

vs.

*Southern Construction Co., et al.*

Mr. F. A. King,
Clerk,

Dear Sir:

Please prepare the record in this case for the Circuit Court of Appeals. You know better than I do the order in which they should be placed, but the following papers should be included in the record:

1. Plaintiff's third amended original petition, filed April 13, 1926.

2. The amended answer of defendant Head, filed May 17, 1926.

3. The first amended answer of Brown-Crummer Investment Company, filed May 17, 1926.

4. The second amended original answer of the Southern Surety Co., filed May 17, 1926.

5. Plaintiff's first amended supplemental petition, filed May 17, 1926.

5½. Defendant Head's supplemental answer, filed May 17, 1926.

6. The agreement and stipulation of the parties, filed June 28, 1926.

7. The verdict of the jury returned May 20, 1926.

8. The judgment of the court rendered May 20, 1926.

9. The bill of exception and addenda thereto, filed June 28, 1926.

10. The petition for writ of error, filed June 28, 1926; and the order endorsed thereon allowing the same.

11. The writ of error.

12. The writ of error bond.

13. The citation in error.

14. The assignment of error.

W. O. DAVIS,
*Attorney for Plaintiff.*

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co. et al. Praecipe for Transcript. Filed June 28, 1926. F. A. King, Clerk by J. R. Blades, Deputy.

**Clerk's Certificate.**

I, F. A. King, clerk of the United States District Court for the Eastern District of Texas, in the Fifth Circuit and district aforesaid, do hereby certify that the foregoing is a full, true and correct transcript of record, bill of exceptions, assignments of error, and all the proceedings in cause No. 241, at law, wherein The City of Gainesville is plaintiff, and the Southern Construction Company, et al., are defendants, as fully as the same remains on file and of record in my office at Sherman, Texas, and that the same constitutes the return to the annexed writ of error and citation in error.

Witness my hand officially, and the seal of the court, at Sherman, Texas, this the 8th day of July, A. D. 1926.

F. A. King, Clerk,
By J. R. Blades, Deputy.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation,

versus

BROWN-CRUMMER INVESTMENT COMPANY et als.

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 9th, 1926

On this day this cause was called, and, after argument by W. O. Davis, Esq., for plaintiff in error, and Alex F. Weisberg, Esq., and F. C. Dillard, Esq., for defendants in error, was submitted to the Court.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation, Plaintiff in Error,

vs.

BROWN-CRUMMER INVESTMENT COMPANY et als., Defendants in Error

Error to the District Court of the United States for the Eastern District of Texas

W. O. Davis (Cecil Murphy on the brief) for Plaintiff in Error.

Alex F. Weisberg (Elcock & Martin; Thompson, Knight, Baker and Harris on the brief), for Defendant in Error, Brown-Crummer Investment Company.

F. C. Dillard (Head, Dillard, Smith, Maxey & Head on the brief) for Defendant in Error, H. O. Head, executor.

John T. Suggs, for Defendant in Error, Southern Surety Co.

Before Walker, Bryan, and Foster, Circuit Judges

OPINION OF THE COURT—Filed July 6th, 1927

FOSTER, Circuit Judge:

The pleadings in this case are too voluminous to be briefly stated. The record is not as clear as it might be but the case shown without serious dispute may be summarized as follows.

In November, 1919, the City of Gainesville, Texas, hereafter referred to as the City, entered into a contract with the Southern Construction Company, hereafter called the Contractor, a partnership composed of Harry D. Levy and Lester Levy, for certain paving and other street improvements. The contract contemplated the City's paying for a portion of the general paving and entirely for the intersections, the City's share being estimated at $50,000.

After some preliminary and supplemental agreements this final result was arrived at. The Contractor agreed to accept warrants, at 5 per cent discount, in amounts of $1,000, maturing March 1, 1921 to March 1, 1940, with interest at 6 per cent, payable semi-annually and evidenced by coupons attached.

The Brown-Crummer Investment Company, hereafter called the buyer, agreed to purchase these warrants when issued and further agreed to print them and to furnish legal advice to the City and supervision of the necessary ordinances, for a further discount of 5 per cent. The warrants up to $47,000 were printed and delivered to H. W. Head, who was in some way interested in the contract, in escrow, and he agreed to indemnify the City on the contract up to $50,000, and furnished the Southern Surety Company, hereafter called the Surety Company, as guarantor for his undertaking.

From time to time as the work progressed the city council adopted ordinances purporting to approve estimates of the engineers covering the work completed, retaining 10 per cent and authorizing the issuance of warrants to

cover same. Head drew drafts on the buyer with the warrants and certified copies of the ordinances attached, and these drafts were paid. Six of the warrants have been paid by the City and the City also from time to time remitted the additional 5 per cent discount to the buyer. The warrants were in form as follows:

Number —, $1,000.00

"UNITED STATES OF AMERICA,
"State of Texas, County of Cook:

"City of Gainesville Street Improvement Warrant, Series A 1

"This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to the Southern Construction Company, Contractor, their assigns or bearer, on the first day of March, 1921, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas, One Thousand Dollars in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the first day of March, 192- and semi-annually thereafter on September 1st and March 1st of each year and the City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest thereon, evidenced by coupons attached hereto principal and interest payable at the place above named upon presentation and surrender of warrant or proper coupon.

"This Warrant is one of a series of Fifty (50) warrants, numbered consecutively from One (1) to Fifty (50) inclusive, in the denomination of One Thousand Dollars ($1,000.00) each aggregating the sum of Fifty Thousand Dollars ($50,000.00), issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to the Southern Construction Company, their assigns or bearer, for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20th, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and Laws of the State of Texas, and

pursuant to an ordinance passed by the City Council of said City of Gainesville, Texas, on the 16th day of December, 1919, recorded in Book 6, at page 583, et seq. of the Minutes of said City Council.

"The date of this warrant, in conformity with the ordinance above mentioned, is November 20th, 1919.

"And It Is Hereby Certified and Recited that all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation.

"In Witness Whereof, the City of Gainesville has caused this corporate seal of said City to be hereto affixed and this warrant to be signed by its Mayor and countersigned by its City Secretary, and registered by the City Treasurer as of the date last above written.

"E. N. Blackburn, Mayor City of Gainesville, Texas.

"Countersigned: S. A. Bryan, City Secretary, City of Gainesville, Texas.

"Registered this the 27th day of April, 1920.

"R. R. Hullett, City Treasurer, City of Gainesville."

Before the paving was completed the work on two streets was stopped by an injunction secured by a taxpayer. Thereafter the contractor offered to do paving on other streets but nothing came of this offer. The warrants, however, had all been issued and had been paid for by the buyer. In October, 1921, suit was brought by the City in the District Court of Cook County, Texas, against the contractor, H. W. Head, and the Surety Company, to recover the difference between the warrants issued and the work done, alleged to be about $15,000. The City at that time apparently had no thought of contesting the validity of the warrants and did not include the buyer in the suit. A default judgment was rendered in favor of the City against the contractor for $4,090 and against the other two defendants for $15,000. On appeal this was affirmed as to the contractor and reversed as to Head and the Surety Company by the Court of Civil Appeals for the Sixth Supreme Judi-

cial District, 254 S. W. 323. The reversal was on the ground that the petition showed no cause of action against Head and the Surety Company. The validity of the warrants was not considered.

On the remanding of the case to the District Court the City filed an amended petition making the buyer a party defendant. The buyer removed the case against itself to the United States District Court for the Eastern District of Texas as a separable controversy and a motion to remand was denied. Thereafter, the City recast its pleadings and again made the Surety Company party defendant, and, as H. W. Head had died in the meantime, H. O. Head, his executor, was brought in. The contractor was omitted from the suit. In the petition in the Federal Court the City prayed for a judgment against the buyer declaring the warrants void and for an injunction restraining their sale or other disposal, and prayed for judgment against the other defendants in the sum of $15,264.71. The buyer set up a counterclaim in the answer and prayed for judgment against the City on the warrants and coupons then due and unpaid. Notwithstanding the prayer for equitable relief the case was tried to a jury and at the conclusion of the evidence the Court directed a verdict in favor of the buyer in the amount of $13,125, and rejected the claim of the City against H. O. Head, executor, and the Surety Company. There are numerous errors assigned but those running to the direction of the verdict are the only ones that need be considered.

The case presents an anomaly in pleading and practice, but applying the remedial provisions of section 269 J. C. as amended (40 Stat. 1157) we may consider it on this writ of error. The court was without jurisdiction as between the City and Head, executor, and the Surety Company, as the case had not been removed as to them and there could be no jurisdiction, as between the City and Head, both being citizens of Texas, in any event. But that could not affect the jurisdiction as to the buyer and in view of the result we may dismiss those two defendants from further consideration.

The City contends that the instruments in suit are in fact bonds and not warrants and are void because not issued in conformity with the City charter and the laws of Texas and

also relies upon certain irregularities in the awarding of the contract and the issuing of the warrants.

The charter of the City of Gainesville was granted by a special act of the Texas Legislature, approved March 17, 1909, which act contains the recital that it shall be considered a public law of Texas, and thereafter, within the same year, was adopted by a vote of the people. Under its general powers the City has full authority to contract; to grade, pave and otherwise improve its streets, and to levy annually for general purposes and for paying its bonded indebtedness ad valorem taxes on all real, personal and mixed property within the territorial limits of the City. The charter contains these specific provisions:

"The specification of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this act to grant and bestow upon the inhabitants of the City of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter or by some general law of the state of Texas, or by the provisions of the Constitution of the State of Texas."

"The provisions of this act shall be liberally construed with a view to carry out the purposes of this charter and in case of doubtful construction, it shall be resolved in favor of the city."

Section 1, article 4 of the charter provides that the City shall have the authority by ordinances duly passed to borrow money for permanent improvements, including paving and re-paving of the streets, and may issue bonds for that purpose in amounts not exceeding $150,000 in any one year, subject to approval by the taxpayers at an election held for that purpose if the amount exceeds $2,500; requires that provision be made at the same time to assess and collect annually a sufficient sum to pay the interest on the bonds and to create a sinking fund of at least 2 per cent; that the bonds shall not pay more than 5 per cent interest and shall be invalid if sold for less than par and accrued interest.

The laws of Texas provide for submission to the taxpayers of a proposition for the issuance of bonds by a city;

that bonds can have no validity unless approved by the Attorney General; and that said bonds must be registered by the Comptroller. R. S. 701-709-710.

If the instruments in suit were to be classed as bonds there could be no doubt of their invalidity but they are not to be so considered. It was not contemplated that the warrants should be issued for the purpose of borrowing money. It was the intention of all parties that they should be issued in payment for work actually done in paving and otherwise improving the streets under the general powers of the City and the fact that they were payable in future years would not render them invalid. It is not shown that the City would not have sufficient funds for general purposes for the years in which the warrants fall due, nor that the taxes assessed would exceed the legal limit imposed upon the City. The distinction between bonds and warrants issued by Texas municipal corporations has been repeatedly recognized by the courts of that state. The provisions of the charter and the Texas law as to bonds do not effect the authority of the City to issue warrants to be paid out of current revenue in the future. Lasater vs. Lopez, 217 S. W. 373; City of Tyler vs. Jester & Co., 97 Texas 344; Bridges vs. City of Lampasas, 249 S. W. 1085.

As affecting the validity of the obligations as warrants the City contends that the paving contract and all the proceedings relating thereto are void because estimates of the cost, and plans and specifications for the proposed work, were not approved by the council before advertising for bids; that the contract as let was different from the bid and less burdensome; and that the contract provided that preference be given to citizens of Texas and Gainesville; and that in some instances estimates of the work completed were not in fact made before the ordinances approving them were adopted. Perhaps these irregularities might have been urged by a taxpayer or an unsuccessful bidder in a suit to enjoin the letting of the contract or to prevent the prosecution of the work, on showing fraud or damage to the City, but after the contract was let and the work completed it is doubtful that the City could urge them against the contractor. The City also contends that there was a failure of consideration. It seems to be agreed between the parties that the amount of work not done under the con-

fract amounted to about $15,000. It is difficult to reconcile this with the fact that when the contractor was sued in the state court the recovery was only about $4,000, but assuming that the deficiency in work done was approximately $15,000, still the City had ample security for that amount.

It is unnecessary however to consider the objections to the warrants above made. The City had the capacity to issue and sell the warrants. Recitals in warrants or other evidences of debt issued in payment of the obligations of a city are made for the purpose of inducing the purchase of the instruments and are binding upon the municipality in the absence of fraud or knowledge on the part of the purchaser of facts that show the invalidity of the warrants.

It is true that a Mr. Blaine represented the buyer initially in negotiating the purchase of the warrants and attended some of the meetings of the council and that Mr. Wm. M. Harris, a well known and reputable attorney of Dallas, also represented the buyer in preparing the ordinances for the adoption of the council and supervised to some extent the subsequent proceedings, but it is not shown that either of these men had any knowledge of any irregularities in the letting of the contract or in the doing of the work or the adoption by the council of estimates, and it is shown without contradiction by the testimony of Mr. Crummer, who represented the buyer in the final purchase of the warrants, that he had no knowledge of any of the irregularities now urged and relied entirely on the recitals in the warrants in buying them.

In this case the City is clearly estopped to urge the irregularities above mentioned and the partial failure of consideration, and it is immaterial that the warrants were sold at a discount. City of South Houston vs. Carman, 6 F. (2d) 358; Slayton & Company vs. Panola County, 283 Fed. 330; Scott County vs. Advance Rumley Thresher Co., 288 Fed. 739; Grimes County vs. W. L. Slayton & Co., 262 S. W. 209; Evansville vs. Dennett, 161 U. S. 434; City of Belton vs. Brown-Crummer Investment Co., 17 F. (2d) 70.

From the above the conclusion reached is that reversible error is not shown in the direction of the verdict in favor of Brown-Crummer Investment Company and to that extent the judgment is affirmed. The case is remanded with

instructions to dismiss the proceedings as between the City and Head, executor, and the Surety Company. And for such other proceedings as may be necessary, not inconsistent with this opinion.

Affirmed in part, reversed in part.

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JUDGMENT

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation,

versus

BROWN-CRUMMER INVESTMENT COMPANY, et als.

Extract from the Minutes of July 6th, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be and the same is hereby, affirmed to the extent of the direction of the verdict in favor of Brown-Crummer Investment Company, and that said cause be, and the same is hereby remanded to the said District Court with instructions to dismiss the proceedings as between the City of Gainesville and H. O. Head, executor, and the Southern Surety Company, and for such other proceedings as may be necessary, not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the plaintiff in error, City of Gainesville, a Texas Municipal Corporation, and the sureties on the writ of error bond herein, H. F. Smith, G. W. Brown, J. B. Tanner, Ed Nelson and A. M. Bell, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

MOTION AND ORDER STAYING MANDATE—Filed July 15th, 1927

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4861

CITY OF GAINESVILLE, Plaintiff in Error,

vs.

BROWN-CRUMMER INVESTMENT COMPANY et al., Defendant in Error

## Application for Stay

To the judges of said Court:

The City of Gainesville, plaintiff in error, respectfully alleges that it will endeavor to have this cause removed to the Supreme Court of the United States by certiorari and will prepare the petition and other procedure as speedily as possible. The judgment bears interest at the rate of six per cent per annum and is secured by writ of error bonds in more than double the amount of the judgment and no possible injury can result from a stay. Wherefore plaintiff in error prays for an order staying the execution of the judgment for the period of three months from July 6, 1927.

(Signed) Cecil Murphy, W. O. Davis, Attorneys for Plaintiff in Error.

## Order

Considering the foregoing petition, it is ordered that the mandate in this cause be stayed until September 1st, 1927, upon plaintiff in error giving bond in the sum of three thousand ($3,000.00) dollars to afford the plaintiff in error an opportunity to file in the Supreme Court of the United States a petition for a writ of certiorari, and that in the event that said petition be filed within the above time, then it is still further ordered that the mandate in this cause do not issue until the Supreme Court of the United States passed upon said petition for a writ of certiorari.

New Orleans, Louisiana. July 14th, 1927.

(Signed) Rufus E. Foster, U. S. Circuit Judge.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation, Plaintiff in Error,

versus

BROWN-CRUMMER INVESTMENT COMPANY et al., Defendants in Error

BOND ON CERTIORARI—Filed July 25th, 1927

Know all men by these presents:

That we, City of Gainesville, a Texas Municipal Corporation, as principal, and Roy T. Potter and J. W. Gladney, as sureties, are held and firmly bound unto Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor of H. W. Head in the full and just sum of three thousand ($3,000.00) dollars to be paid unto the said Brown-Crummer Investment Co., and various others as stated above, their successors and assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and firmly by these presents.

Sealed with our seals and dated this the — day — July, A. D. 1927.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit, in the above suit pending in the said United States Circuit Court of Appeals, wherein the City of Gainesvile, a Texas Municipal Corporation, was plaintiff in error, and the Brown-Crummer Investment Company, and others, were defendants in error, a decree was rendered against the said City of Gainesville, a Texas Municipal Corporation, and the said plaintiff in error has this the 15th day of July, A. D. 1927, obtained a stay of the mandate of the said United States Circuit Court of Appeals in the above entitled and numbered cause until the first day of September, A. D. 1927, to enable plaintiff in error to apply for and obtain a writ of certiorari from the Supreme Court of the United States to the said United States Circuit Court of Appeals;

Now, therefore, the condition of this obligation is such that if the said City of Gainesville, a Texas Municipal Corporation, fails to make application for such writ on or before September 1st, 1927, or fails to obtain an order granting its application, or fails to make its plea good in the Supreme Court, it shall answer for all damages and costs which the said Brown-Crummer Investment Co., and others, may sustain by reason of the stay, otherwise this obligation shall be null and void.

City of Gainesville, a Texas Municipal Corporation, by (Signed) Frank R. Stanford, Mayor. (Signed) J. W. Gladney, Roy T. Potter, Surety.

Approved: (Signed) Rufus E. Foster, U. S. Circuit Judge.

THE STATE OF TEXAS,
County of Cooke:

I, Tom J. Midkiff, Clerk of the District Court for Cooke County Texas, do certify that I am well acquainted with Roy T. Potter and J. W. Gladney, the sureties on this bond. They are engaged in the banking business and are solvent and responsible. Each of them owns unencumbered property subject to execution of a value many times exceeding the said bond.

Given under my hand and seal of office, this the 18th day of July, 1927.

(Signed) Tom J. Midkiff, Clerk of the District Court for Cooke County, Texas. (Seal.)

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 286 to 302 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered

4861, wherein the City of Gainesville, a Texas Municipal Corporation, is plaintiff in error, and Brown-Crummer Investment Company et al., are defendants in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 285 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 26th day of July, A. D. 1927.

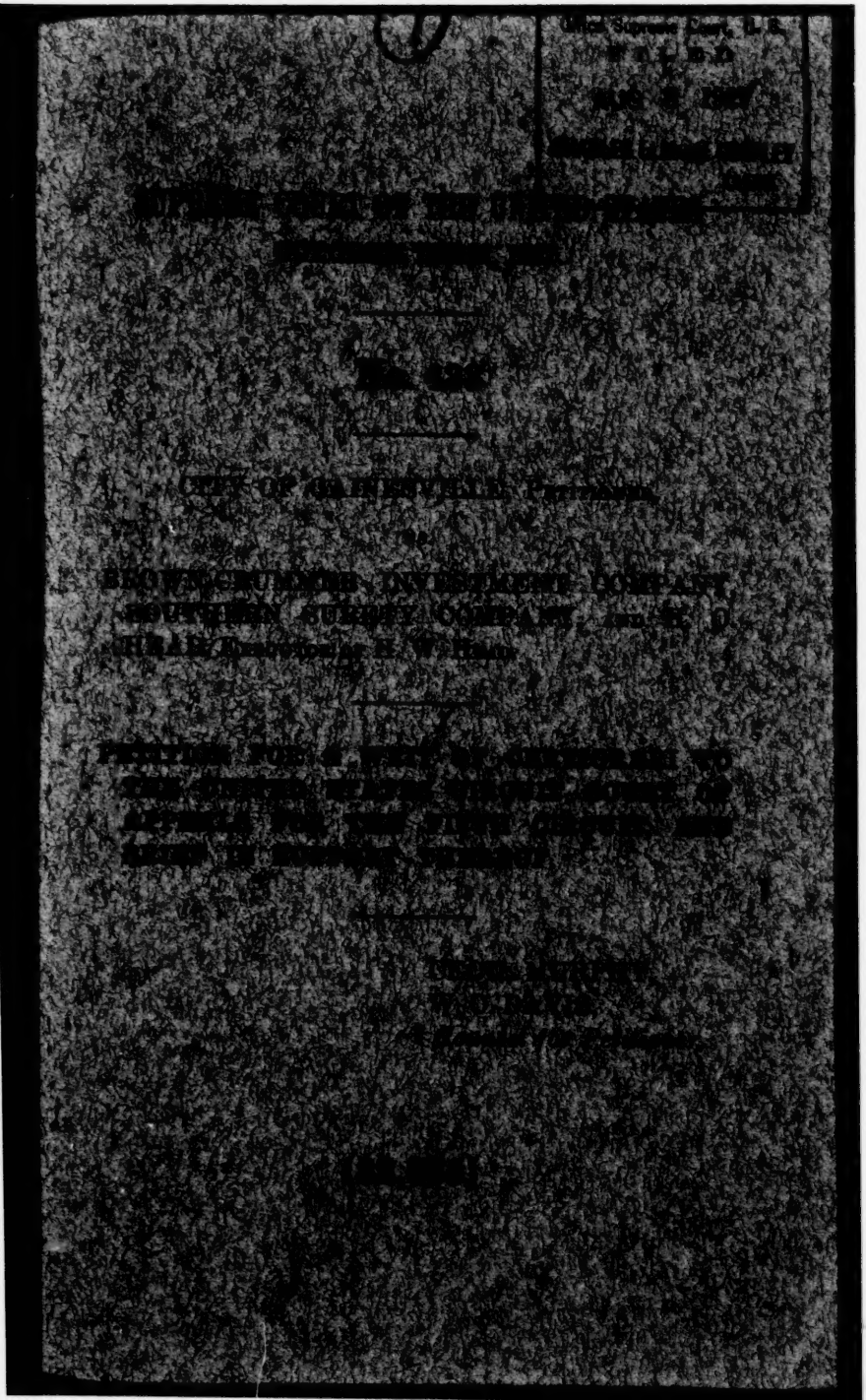
Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 31, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8364)



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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1927.**

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## No. 433

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CITY OF GAINESVILLE, PETITIONER,

*vs.*

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR OF H. W. HEAD, RESPONDENTS.

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## PETITION FOR CERTIORARI.

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*To the Supreme Court of the United States:*

Gainesville is a Texas city of exceeding five thousand inhabitants, incorporated under a special act of the legislature of which the courts take judicial notice. The Southern Construction Company, a partnership, hereafter called the Construction Company, did some paving in Gainesville under a contract, by which it was to look to the abutting lot owners for their *pro rata* of the costs, but to accept city treasury warrants at par

for the city's part (140). The statement in the opinion that the warrants were taken by the Construction Company at a discount of 5 per cent is error. The city was to pay 90 per cent of its *pro rata* of the cost as the work progressed, upon estimates approved by the engineer, reserving the remaining 10 per cent until the completion of the work (156). The city's *pro rata* of the contemplated work was supposed to be around $50,000. The Construction Company did paving, the city's part of which was $3,000. This was accepted, the warrants issued, and they have since been paid. Before any other paving was done, warrants for the additional sum of $47,000 were issued, pursuant to resolutions falsely reciting that the paving had been completed, inspected and accepted, when nothing had in fact been done. One of these resolutions passed on the 21st of September, 1920, provided for the issuance of ten $1,000 warrants to the Southern Construction Company, numbered 41 to 50, inclusive (171). Another resolution passed on October 5, 1920, authorized the issuance of seventeen $1,000 warrants to the Construction Company, numbered 34 to 40, inclusive. On November 2, 1920, another resolution was passed directing the issuance of ten $1,000 warrants to the Construction Company, numbered 14 to 23, inclusive (172). Another resolution was passed on November 16, 1920, directing the issuance to the Construction Company of ten $1,000 warrants, numbered 4 to 13, inclusive (172). At the time of the issuance of these warrants the paving which they were intended to represent had not been laid, nor had the ground been broken. There were no

engineers' estimates, nor had anything been inspected, accepted or received. The recitals were untrue.

H. W. Head, on September 10, 1920, executed to the city of Gainesville, his obligation reciting that under an order from the Construction Company any moneys due from the city of Gainesville were to be paid to him, said moneys being payable in warrants, and that he understood it was the purpose of the city council to have issued to the Construction Company $10,000 in warrants, which were to be properly indorsed by the Construction Company and delivered to him. And in the event of any dispute, discrepancy or other contingency arising which might in any way affect the amount of work done or materials furnished by the Construction Company so as in any way to affect the $10,000 warrants, he agreed to protect and indemnify the city up to the sum of $10,000 (12). And further reciting that none of said moneys will be paid or credited to the Construction Company except in such amounts as may be shown to be due under the signature of the mayor of Gainesville, and when such amounts should equal $10,000, then the obligation to be discharged (13). On the 4th of October, 1920, H. W. Head executed to the city of Gainesville an additional obligation, in substance the same as the first, except it contemplated the issuance of $37,000 additional warrants, and bound himself to make good to that amount (15). The Southern Surety Company guaranteed each of the above obligations. After the passage of these resolutions, the Construction Company did no more paving until 1921, when it did paving which was ac-

cepted and received by the city, amounting to $31,735.29, leaving $15,264.71 worth of paving undone. After doing this paving, the Construction Company abandoned the work (183).

The city brought suit in the District Court for Cooke County, Tex., against the Southern Construction Company, H. W. Head and the Southern Surety Company to recover the difference between the paving it had received and the paving it had paid for; and in the same suit prayed for judgment against the Construction Company individually for gravel and materials furnished, and for hire of teams and some other things. Judgment by default was rendered against the three defendants for $15,000, and against the Construction Company for $4,090 (120). This judgment was reversed on appeal as to Head and the Surety Company. Head *vs.* City of Gainesville, 254 S. W., 323. The opinion of the circuit court of appeals is incorrect in saying that the judgment for $15,000 was against only two of the defendants. It was against all of the defendants, and, in addition to that, an individual judgment was rendered against the Construction Company for $4,090, which has never been paid. In the meantime H. W. Head died, and, upon the remand of the case to the State district court, his executor answered, questioning the validity of the warrants, claiming that they were illegal and void. It was then that the city made the Investment Company, the holder of the warrants, a party to the suit, praying that in case the warrants were held to be illegal and void that they be so declared. The city was thus seeking to bind

the Investment Company by the judgment. The Investment Company petitioned for the removal of the case to the District Court of the United States for the Eastern District of Texas, and that court overruled a motion to remand. Afterward the pleadings were recast. The amended petition alleging all the facts relating to the contract, the issuance of the warrants, the shortage in the paving and the obligation of H. W. Head and the Surety Company, and praying for judgment against the Surety Company and H. W. Head's estate for the difference between the paving done and the paving paid for, but asking that if the warrants be invalid they be so adjudged. H. W. Head's estate and the Surety Company alleged the warrants were invalid and the reason why they were invalid. The Investment Company, by cross answer, sought to recover on the warrants then past due and some unpaid interest on the other warrants. The city, in reply to this cross answer, alleged all the facts connected with the transaction and that it received no consideration for $15,264.71 of the warrants, and that the warrants sued on were the last issued, and asked that if the warrants are held invalid for judgment so declaring, but if valid that it have judgment against Head's estate and the Surety Company for $15,264.71, as the difference between the paving received and the amount of the warrants, with interest. The case being tried before a jury, the court directed a verdict in favor of the Surety Company against the city for $13,125.40, and that the city take nothing as to Head and the Southern Surety Company, and rendered judgment accordingly (227

and 122). The city carried the case by writ of error to United States Circuit Court of Appeals, Fifth Circuit, which court, on July 6, 1927, affirmed the judgment in favor of the Investment Company against the city, but held it had no jurisdiction of the controversy between the city and the estate of H. W. Head and the Southern Surety Company.

The circuit court of appeals was in error in saying that the city retained 10 per cent when it issued the warrants complanied of. It is true the contract required the city to retain 10 per cent, but it did not do so, but issued warrants for the full amount of work the Construction Company was to do, retaining nothing, thus paying in full for the work before it was done (166 to 189).

The opinion says that the warrants in question were delivered to H. W. Head in escrow. The warrants were issued pursuant to resolutions reciting that they were in payment of indebtedness to the Construction Company and directing their delivery to that company. The Construction Company indorsed the warrants and delivered them to H. W. Head, who delivered them to the Investment Company when it paid for them. There was evidently some outside understanding, not shown on the records of the city, contemplating that Head should use the proceeds of the warrants in paying for the work that was to be done, and his obligation was that the city should receive the $47,000 of paving that it had paid for.

The opinion says that assuming the deficiency in the work was approximately $15,000, still the city had

ample security for that amount. The Construction Company was insolvent. The charter, the instruction to bidders and the bid itself required a construction bond in the amount of the contract. The statute required, in addition to this, the usual penal bond conditioned to pay for the work and material. The contract contemplated the expenditure of exceeding $150,000, yet we find the only bond given was in the sum of $5,000 (164). The instructions to bidders (133) and the bid (134) required the Construction Company to execute a bond to maintain the work for five years, but no such bond was given. The United States District Court instructed a verdict in favor of Head and the Surety Company, doubtless upon the ground that the bond was unenforceable. In what way could the circuit court of appeals reach the conclusion that Gainesville had ample security for the $15,264.71?

There is no question but that the pleadings, requested instructions, exceptions to the charge, and specification of error are sufficient to raise the question sought to be reviewed.

I.

The so-called treasury warrants in question are in fact bonds, and void because the qualified voters of Gainesville did not give their consent to their issuance at an election held for that purpose. Section 1, Article 4, of the charter prohibits the issuance of bonds in excess of $2,500 unless a majority of voters shall give their consent thereto at an election held for that purpose (128). Article 701 of the Revised Statute

says, "The bonds of an incorporated city or town shall never be issued for any purpose unless the proposition for the issuance of such bonds shall have been first submitted to the qualified voters who are property taxpayers of such city or town." This statute overrides the provisions of the charter. City of Beaumont *vs.* Fall, 291 S. W., 202. In the recent case of A. F. Pulte *vs.* J. Z. Keel, Mayor, *et al.*, not yet reported, the Court of Civil Appeals for the Second Texas District held that obligations, in no respect different from the warrants in question, attempted to be issued by the City of Gainesville, were in fact bonds and void, because the tax-paying voters did not give their consent thereto at an election held for that purpose. That holding is directly in conflict with the opinion of the circuit court of appeals in the present case. The charter of the City of Waco is not materially different from that of Gainesville. In Foster *vs.* City of Waco, 255 S. W., 1104, the Texas Supreme Court held that promissory notes executed by the city for land bought for cemetery purposes were void because not authorized at an election held for that purpose.

The form of the warrants in question is given on page 245 of the printed record. It says:

> "This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to The Southern Construction Company, Contractor, their assigns or bearer, on the 1st day of March, 19—, at the offices of The Brown-Crummer Investment Company, Wichita, Kan-

> sas, the sum of One Thousand Dollars in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of 6 per cent (6%) per annum, payable on the 1st day of March, 1920, and semi-annually thereafter on September 1st and March 1st of each year; and the City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest payable at the place above named, upon presentation and surrender of warrant or proper coupon."

The direction to the treasurer to pay does not add to or take from the instrument or change its essential character. But for the inhibition against the issuance of bonds, this instrument would doubtless have been called a bond, and the evident purpose was to evade the inhibition against the issuance of bonds.

II.

The removal of the suit to the Federal court upon the petition of the Investment Company, a citizen of Kansas, if removable, carried the entire case, and the circuit court of appeals should not have refused to take jurisdiction of the controversy between the City of Gainesville and the Surety Company and the Head estate. Section 28, J. C., says: "may remove said suit into the District Court of the United States for the proper district." The statute has not been changed since the decision in Barney *vs.* Latham, 103

U. S., 205 and 212. In Hamilton *vs.* Empire Gas and Fuel Company, 297 Fed., 429, it was held that the removal of a separable controversy carried the whole case into Federal court. To the same effect is Cornell *vs.* Smiley, 256 U. S., 341, and Brooks *vs.* Clark, 119 U. S., 502. There seems to be a conflict between the holding of this court and the Circuit Court of Appeals for the Fifth Circuit. If the circuit court of appeals believed it was without jurisdiction of the controversy between the City of Gainesville on the one part and the Surety Company and the Head estate on the other, it should have directed its remand to the State court and not its dismissal.

III.

It is a question whether the paving contract and the proceedings thereunder are void because of the failure of the council to comply with the mandatory provisions of the charter and the statute. The limitation on the power of boards of aldermen to incur indebtedness binding upon the municipality is nowhere more clearly stated than in the opinion of Judge Fields in Zortmann *vs.* San Francisco, 20 Cal., 96; 81 Am. Dec., 96, and note page 107. In Texas these limitations are so fully recognized that a petition against a municipality seeking to enforce a contract is demurable unless it clearly sets forth the facts and circumstances authorizing the contract. American Roads Machinery Co. *vs.* City of Ballinger, 210 S. W., 265. McNeal *vs.* City of Waco, 89 Tex., 83; 13 S. W., 322. Articles 544 to 547 of the Revised Statutes, now Articles 1082 to

1085, inclusive, of the present statutes, were incorporated into the charter of Gainesville (130). It is prescribed in Article 1083 that when a council shall determine to make any street improvement, the council shall cause estimates to be made of the probable costs thereof by the city engineer and by some other officer of the city, or by a committee of three aldermen. This was not done, and rendered the attempted contract void. Frosh *vs.* City of Galveston, 73 Tex., 401; and City of Corsicana *vs.* Kerr, 89 Tex., 461; 35 S. W., 794.

Section 28, Article 2, of the charter prescribes that all contracts pertaining to public improvements involving as much as $250 shall be based upon specifications prepared, submitted to and approved by the mayor and city council, and after such approval, advertisement for the proposed work shall be made, inviting competitive bids for the work to be done (125). No specifications or plans were ever submitted to or approved by the council prior to the building. Section 28 of Article 2 also provides that all bids shall be sealed and shall be opened by the mayor in the presence of a majority of the aldermen, and shall remain on file in the mayor's office, open for public inspection, at least forty-eight hours before any award is made to any competitive bidder (127). This was not done, but the contract was awarded within twenty-four hours after the bids were opened. The instruction to bidders apprised them that a construction bond would be required in the full amount of the contract, and that a bond for the maintenance of the work for five years

would be exacted. The bid of the Construction Company was accepted twenty-four hours after it was opened, leaving off the maintenance bond and the construction bond, and providing, in lieu of the construction bond, the putting up of $5,000 in collateral satisfactory to the council (164). This was done in disregard of Section 29, Article 2, of the charter, saying that the council shall require a good and sufficient construction bond of all contractors, with at least two good and sufficient securities (127); and Article 5160 of the Revised Statute, saying there shall be required of the contractors before commencement of the work the usual penal bond, with the additional obligation that such contractor shall promptly make payment to all persons supplying him or them with labor and material in the prosecution of the work provided for in such contract. The contract and specifications provided that in the construction of the work the contractor should give preference in employment to the citizens of Gainesville, and when such citizens are not available preference should be given citizens of the United States (146). In no matter relating to this contract did the council get within hailing distance of the law.

## IV.

The next contention is that by instructing a verdict in favor of the Investment Company the district judge invaded the province of the jury and denied to the city of Gainesville a right guaranteed by the Seventh Amendment to the Constitution of the United States.

A suit upon city warrants, to which is interposed the defense of want or failure of consideration or of lack of authority to issue the warrants, is a case at law. If by estoppel an invalid warrant can be made binding (Dillon 857), that law cannot aid the Investment Company. The evidence is sufficient to show that the Investment Company kept in touch with the proceedings from the beginning to the end and is the author of the scheme by which invalid warrants were made to appear valid by false recital in ordinances and resolutions. On November 19, 1919, the day the contract was signed, the Investment Company, through its agent, J. E. Blain, contracted to purchase the warrants from the Construction Company at $.95 on the dollar (207). The Construction Company immediately employed Harris, McCall & Graham to look after the proceedings. It should be presumed that Harris, McCall & Graham informed themselves in reference to what had been done, in order to qualify themselves to pass upon its validity. On December 15, 1919, these attorneys, Harris, McCall & Graham, wrote to the city secretary inclosing the form of an ordinance relating to the contract and providing for the issuance of warrants. The attorneys sent two copies and requested the secretary to return one of them properly certified (209). The ordinance was passed without any change. It contains many false recitals, such as an estimate of costs had been made and plans of specifications approved, and that the bids, after being opened, had remained on file for forty-eight hours

before the contract was awarded. In other words, the resolution recited, not what had been done, but what should have been done in order to make the contract valid. The Construction Company had agreed to accept warrants at par, which meant face value and accrued interest. On January 2, 1920, Harris, McCall & Graham wrote to J. E. Blain, the Investment Company's agent, calling his attention to two corrections which they desired made in the ordinance which they had sent and which had been passed and approved on December 16, 1919. They said that they had made the corrections in their copy, and for Blain to see that the same changes were made in the original record (210). The so-called copy that Harris, McCall & Graham had was the original of the ordinance which had been passed. The changes thus made after the ordinance had been passed and approved entitled the Construction Company to the interest accruing from November 20, 1919, until the delivery of the warrants a year afterwards, which interest found its way to the Investment Company. On June 18, 1920, the Investment Company, through its agent, J. E. Blain, secured from the city an agreement by which the city was to pay to it 5 per cent on all warrants issued to the Construction Company, and in which the Investment Company agreed to furnish the legal proceedings for their issuance to the Southern Construction Company (205).

After this J. E. Blain and Harris, McCall & Graham took charge of the matter and the council did whatever they were requested to do. The fraudulent resolution

for the issuance of the warrants was prepared in Dallas in duplicate, or triplicate, by Harris, McCall & Graham, and were brought to the city council by J. E. Blain, the Investment Company's agent, together with false affidavits already prepared by Harris, McCall & Graham for the aldermen and city officials to make, to the effect that recitals in the resolutions were true (166). Certificates showing that the original was a true copy was already prepared so that the secretary had nothing to do except "sign here." These resolutions were passed at night, and upon most occasions the mayor was absent on account of sickness. On these occasions, upon the adjournment of the council, Blain and Levy, a member of the Construction Company, would carry the resolutions and warrants to the mayor's residence and there have him to sign them (184). Blain knew that the paving had not been done (216). J. E. Blain was not produced as a witness, nor was any member of the firm of Harris, McCall & Graham, or reason shown for their non-production. It is true that R. E. Crummer, the vice-president and active head of the company, testified that he knew nothing except what the warrants and resolutions show, but he was deeply interested in the transaction and in some respects his evidence is shown not to be true. He testified that he did not know what was in the contract between the city and the Construction Company and that he could not say that the expression, "work performed and material furnished," struck him as somewhat peculiar, and that he presumed that

the city officials prepared the resolution (196). On June 17, Blain wired the Investment Company to know "how much more discount we need on Gainesville warrants and to give all suggestions they can" (203). The Investment Company replied, "We should have at least 5 per cent reduction. Call attention to provisions of contract that work should be completed in 180 working days" (203). J. E. Blain continued to act for the Investment Company. As warrants were issued and turned over by Head to the Investment Company, J. E. Blain was on hand to collect from the city the 5 per cent (208). Whenever the Investment Company wanted anything done in reference to the matter, it called upon Blain.

There was no engineer's estimate, but the resolution contained a statement signed by the Construction Company to the effect that the city was indebted to it for work and material to the amount of ten or seventeen thousand dollars, as the case was, but not described more definitely than by the term "work and material."

## V.

The next contention is that there was no separable controversy authorizing the removal to the District Court of the United States, and the Federal court did not acquire jurisdiction. The suit was an action at law by the city against the Construction Company, H. W. Head and the Surety Company to recover money claimed to be due. When Head's executor interposed the defense that the warrants were invalid and of no

value, the city contending that they were valid, made the Investment Company a party defendant in order to bind it by the judgment, under the liberal rules prevailing in Texas. Head's estate and the Surety Company claimed nothing of the Investment Company and the Investment Company claimed nothing of them. The city claimed nothing of the Investment Company except in the event that warrants were held to be illegal, but in that event that they be so declared. In Texas since the beginning, legal and equitable causes of action may be combined, and the parties, whether praying for legal or equitable relief, were entitled to a trial by jury. (Revised Statutes, Art. 2003.) Pleadings need not be consistent, but every party, whether plaintiff or defendant, can assert inconsistent claims in the same petition or answer. Section 28, *J. C.*, says:

> "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district."

## VI.

The holding of the circuit court of appeals in reference to the validity of the warrants is in conflict with the decision of the Texas Court of Civil Appeals in A. F. Pulte *vs.* J. Z. Keel, Mayor, *et al.*, and in con-

flict with the decision of the Texas Supreme Court in the case of Foster *vs.* the City of Waco, 255 S. W., 1104. It is also in conflict with the uniform rule in Texas, and of this Court in Wall *vs.* the County of Monroe, 104 U. S., 74; the Mayor *vs.* Ray, 19 Wallace, 468, to the effect that treasury warrants are not negotiable under the law merchant, and the holder takes subject to any defense which the municipality may have. The holding of the circuit court of appeals to the effect that the entire case was not removed to the Federal court, and that it acquire jurisdiction of nothing except the controversy between the city and the Investment Company, is in conflict with the decisions of this Court and other Federal courts, such as Barney *vs.* Latham, 103 U. S., 205 and 212; Hamilton *vs.* Empire Gas and Fuel Company, 297 Fed., 429; Cornell *vs.* Smiley, 256 U. S., 341; Brooks *vs.* Clark, 119 U. S., 502. The holding of the circuit court of appeals is also in conflict with the decision of the Supreme Court of Texas and with the uniform rule that boards of aldermen have no general authority to bind the city by contract and can only do so at the time and in the manner authorized by law. Frosh *vs.* City of Galveston, 73 Tex., 401; and City of Corsicana *vs.* Kerr, 89 Tex., 461, and 35 S. W., 794, and many other cases. The question is one of general public interest in Texas and in nearly every other State, and if the ruling complained of is law, then there are no restrictions upon the power of boards of aldermen to anticipate and squander the revenue of future years. The

case involves the right of trial by jury, guaranteed by the Seventh Amendment to the Constitution of the United States, for if, in a case like this, where the unquestioned proof shows, or at least is sufficient to justify the conclusion that the scheme to defraud the taxpayers was devised by the purchaser of the warrants and its agents, and that they knew the real facts, then the supposed right of trial by jury is a delusion.

## VII.

Petitioner attaches hereto a transcript of the record in the case, including the proceedings in the circuit court of appeals, and prays that this petition be granted and the cause removed to this Court for correction of the errors complained of.

CECIL MURPHY,
W. O. DAVIS,
*Counsel for Petitioner.*

## ARGUMENT.

A decent regard for the welfare of those who come after demands that if municipal boards be given the right to anticipate and squander the revenue of future years, that such right be hedged with limitations and restrictions as has been done in Texas. Bonds cannot be issued without the consent of the qualified tax-paying voters given at an election held for that purpose. They cannot run for a longer period than forty years or bear interest at a greater rate than 5 per cent or be sold for less than par. They cannot exceed a stated per cent of assessed values. They must be submitted to the attorney general, accompanied by statements of the other indebtedness of the municipality, the annual expenses of municipal government, and assessed values as shown by the tax rolls and the tax rate. To be of any validity, they must be approved by the attorney general and registered in the office of the comptroller. Thus precautions are taken to secure fairness, deliberation and wise action looking to the interest of citizens as well as investors. A sinking fund sufficient to pay the bonds is provided and safeguarded. At the time these restrictions upon bonds were enacted, warrants such as are involved in this suit had never been used. They are a thing of recent years, devised to evade the inhibition against bonds. If they are valid, then there is no limitation as to interest except the statute against usury. There is no limitation as to time except the constitutional requirement of a sinking fund of at least 2 per cent.

There is no limitation as to the amount. The entire revenue of future years can be anticipated and nothing left for other purposes. Can the law be thus nullified by calling a bond a warrant? Any long-time paper to be paid out of the revenue of future years is a bond within the meaning of the statute. This is the effect of the recent decision of the Texas Supreme Court in Foster *vs.* City of Waco, 255 S. W., 674, and of the court of civil appeals in Pulte *vs.* Keel, not yet reported.

The section of the charter in reference to its provisions being liberally construed and doubts solved in its favor does not and cannot do away with the general rule of construction in relation to powers granted to municipalities. Section 53, Art. 3, of the State constitution says the legislature shall not pass any special law regulating the affairs of cities, towns or wards.

Section 5 of Art. 11 of the State constitution, in force at the time of granting this charter, said, "Cities having more than 10,000 inhabitants may have their charters granted or amended by special act of the legislature." Gainesville was incorporated as a city of 10,000. The constitution has since been amended so as to read 5,000, and a self-governing amendment has been adopted. It has been held in Texas that power granted to the legislature to charter a city by a special act does not carry with it the power to incorporate special legislation therein inconsistent with the general law and policy of the State, for that would be special legislation forbidden by the Constitution. In a special act granting a charter, the rules of evidence

cannot be changed, nor can the rules for construing statutes be modified or anything incorporated inconsistent with general law. City of Beaumont *vs.* Fall, 291 S. W., 202. "Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the municipality and the power is denied." City of Brenham *vs.* Brenham Water Company, 67 Tex., 542, cited with approval in Ennis Water Works *vs.* City of Ennis, 233 U. S., 656. Anything contained in the special act changing this rule and making it applicable to a particular city would be special legislation.

The suit was an action at law brought by the city against Head and the Southern Surety Company to recover on a written obligation executed by Head and guaranteed by the Surety Company. Head alleged that the warrants concerning which the obligation was given were illegal, void and of no value, hence the city suffered no damage. The city, still asserting that the warrants were valid, made the Investment Company a party, asking that in case the warrants were ascertained to be invalid that they be so declared or annulled. This was the condition of the record at the time of the removal to the Federal court. There was no controversy between the city and the Investment Company which could be tried in the absence of Head. The city sought to have the Investment Company bound by the result of its suit against Head. If Head and the Southern Surety Company were left in the State court, then nothing was carried to the Federal court that could be there tried, especially before the

final termination of the controversy between the city and Head. This shows that either the case should not have been removed to the Federal court or that the entire case was carried there. In any event, the question is of serious import to litigants in the Fifth Circuit, and a ruling in conflict with the decisions of this court and of other circuit courts of appeals should be reviewed.

In the letting of the paving contract not a single provision of the statute or charter was complied with. Under the decisions of Texas construing the statutory provisions in question, long before this contract was let, the failure to observe statutory requirements in paving contracts render them and the proceedings thereunder void. This has become a settled rule of decision in Texas, and the question is one of vital importance to every municipality in the Fifth Circuit. A decision like the one complained of, to the effect that boards of aldermen can disregard statutory requirements and do as they please with the public business, should not stand, to invite future disregard of the law.

Judge Dillon, Volume II, Section 857, says: "A municipal corporation is not estopped, after a warrant upon its treasury has been issued, to set up the defense of *ultra vires*, or fraud, or want or failure of consideration." This statement of the law cannot be questioned. The recitation of an audit or the statement of the amount, or that it is owing, contained in a warrant does not furnish the basis for an estoppel, for all warrants contain statements of that kind. A recitation in a non-negotiable obligation is not a thing upon which a purchaser can rely. Every I. O. U. con-

tains a representation, bu not one upon which the purchaser can rely. Aside from everything else, the city received no considera ion for $15,264.71, or at least to that extent the con ideration has failed. The estoppel rests alone in the e vidence of R. E. Crummer, the vice-president and ma nager of the Investment Company. It is true he te stified that he relied upon the representations contain d in the warrants and the resolutions directing their is suance. Mr. Crummer has a pecuniary interest in th e transaction. Since the morning of time, interest as discredited and some-times disqualified a witnes The maxim "*Falsus in uno, falsus in omnibus*" ap lies here. He said in one place that he had never see the contract between the city and the Construction C ompany and knew nothing of its provisions (196). O June 18, 1920, he wired J. E. Blain, calling his atte tion to some provisions of the contract and showing hat he knew its contents (203). When asked concer ing the authorship of the resolutions, he said he pres med the city officials pre-pared them. Yet we find th t he agreed to furnish the legal proceedings and that is attorneys, Harris, Mc-Call & Graham, did so. T e manner in which these resolutions and false affidav s were prepared at Dallas by Harris, McCall & Graha n and brought to Gaines-ville and presented to the ouncil by J. E. Blain is fully explained on page 193 f the record. J. E. Blain was the agent of the Invest nent Company, represent-ing it in the purchase of th warrants. Notice to the agent is notice to the buyer There could be no ques-tion that J. E. Blain knew that the paving had not been done. Notice to the attorney of the buyer is

notice to the buyer. Harris, McCall & Graham evidently knew that the paving had not been done at the time of the issuance of the warrants and that the warrants were being illegally issued. If J. E. Blain and Harris, McCall & Graham did not know the real facts, why were they not produced as witnesses? The failure of the Investment Company to produce its agent and attorneys, through whom it acquired the warrants, gives rise to an unfavorable presumption. The changes made by Harris, McCall & Graham in an ordinance after it had been enacted and approved indicates that they were indifferent as to the real facts provided everything was fair upon its face. The Investment Company was not expecting to hold the warrants, but to sell. It was supposed the buyer would be, they thought, protected by the recitals and affidavits. A city cannot be estopped by an affidavit made by one of its aldermen, for it is not part of his duties to make an affidavit. When a thing is overdone, it gives just ground for suspicion. If the paving had been done and the money was due, affidavits would not have been thought of. In other words, the estoppel was sought to be created by the parties who knew that the recitals were false and the money was not due. The Investment Company wrote suggesting that, in advance of the work, the warrants should be issued and placed in the bank at Wichita, Kans. When we bear in mind that warrant cannot be issued until the claim is audited and allowed, it is evident that the Investment Company knew that false recitals would be necessary to give to the proceedings the appearance of validity.

Anything is a fraud where a false recital has to be spread upon the records to create the appearance of validity. The opinion cites W. L. Slayton & Co. *vs.* Panola County, 283 Fed., 330. In that case one J. L. Arlitt combined with the county commissioners and others to defraud the county, and caused renewal warrants to be issued to Arlitt for $160,000 when nothing was due. These warrants were issued in lieu of warrants which never existed. Arlitt sold the warrants to Slayton & Co. for $159,000; $15,000 of this money never reached the county treasury, but was doubtless paid to Arlitt and others for perpetrating the fraud. The warrants, in any event, could have been defeated in the hands of Arlitt, for he originated the scheme. If the resolutions had been prepared by the city officials, the names of the aldermen and the date of the session would not have been left blank, nor would a carbon copy have been used instead of the original. The resolutions were prepared by someone who did not know the names of the aldermen nor the time of the session. This was all shown on the face of the papers that Crummer had, and he had had enough correspondence with Harris, McCall & Graham to be familiar with their typewriter.

The warrants in question are in the hands of the Investment Company, whose agents originated the scheme, prepared the papers and endeavored to make everything appear fair upon the records, when it was well known that the paving had not been done and nothing was due. The Investment Company, by way of discount and interest earned before they acquired the warrants, received $8,000 for this job, while Arlitt

received $15,000 for his job. That case is certainly not to be commended.

There are some other cases cited in the opinion where similar frauds were perpetrated. In some of them Arlitt figured and in others Crummer. These cases indicate that they are men engaged in the business of framing estoppels and teaching aldermen and county commissioners how to evade the law.

Mr. Crummer's testimony was discredited in many respects. The evidence shows that the agent and attorneys of the Investment Company knew that the work had not been done and a fraud was being perpetrated. The Investment Company was afraid to produce its agent and attorneys, for they would be forced to admit that the warrants were for paving that had never been done. A warrant cannot be issued except for work really done. The city of Gainesville was entitled to have the issue submitted to the jury. Neither the district court nor the circuit court of appeals can, under the Constitution, deprive the city of that right.

The suit had been pending for years. Mr. Crummer, if he did not already know, had time to investigate, and doubtless did investigate. Yet he failed to produce his agent and attorneys and presumed that the city officials prepared the resolutions. A jury did not have to believe him.

Respectfully submitted,

CECIL MURPHY,
W. O. DAVIS,
*Counsel for Petitioner.*

FILED
FEB 7 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

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# No. 433

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CITY OF GAINESVILLE, PETITIONER,

*v.*

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR.

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## BRIEF FOR PETITIONER.

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CECIL MURPHY,
W. O. DAVIS,
*Counsel for Petitioner.*

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(32,885)

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1927.**

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# No. 433

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CITY OF GAINESVILLE, PETITIONER,

*v.*

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR, RESPONDENTS.

---

## BRIEF FOR PETITIONER.

---

### Grounds of Jurisdiction.

This suit was brought in the District Court for Cooke County, Texas, on October 11, 1921, by the City of Gainesville (a Texas municipal corporation), hereafter called the city, against the Southern Construction Company (a partnership composed of Lester Levy and Harry D. Levy, citizens of Texas), hereafter called the Construction Co.; the Southern Surety

Company (an Iowa Corporation) hereafter called the Surety Co., and H. W. Head, a citizen of Texas, residing in Grayson County, to recover exceeding $15,000 (R., 119). Default judgment was rendered by said court in favor of the plaintiff against all defendants for $15,000 and against the Construction Co. for $4,090, which judgment upon appeal by Head and the Surety Co. was reversed by the Court of Civil Appeals for the Sixth District as to Head and the Surety Co. but affirmed as to the Construction Co. (See Head *vs.* City of Gainesville, 258 S. W., 323.) Upon the remand of the suit to the District Court of Cooke County, H. O. Head as executor made himself a party in lieu of H. W. Head, who had died, and he and the Surety Co. filed an answer to the petition alleging the invalidity of the warrants. Thereupon the city amended its petition making the Brown-Crummer Investment Company (a Kansas corporation), hereafter called the Investment Co., a party defendant, and the Investment Co. within the time allowed by law filed its petition to remove the cause to the District Court of the United States for the Eastern District of Texas upon the ground of a separable controversy. After a transcript of the proceedings was filed in said court, a motion to remand, timely made by the city, was overruled. All parties recast their pleadings in the United States District Court with exception of the Construction Co., which did not appear. The Investment Co. by cross-answer sought to recover judgment against the city for exceeding $12,000 (R., 119). The case was tried in said court on the 25th day of May,

1926 (R., 123). The court directed the jury to return a verdict in favor of the Investment Co., against the city, for $13,125 with interest at the rate of 6 per cent per annum from rendition, and that the city take nothing as to H. O. Head, executor of H. W. Head, deceased, and the Surety Co. upon the causes of action asserted by the city against them. A verdict was returned and judgment entered in accordance with the instructions of the court (R., 225 and 123). The city carried the case by writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, which on the 6th day of July, 1927, affirmed the judgment of the lower court (R., 294) in favor of the Investment Co. against the city, but the court being of the opinion that it was without jurisdiction of the controversy between the city and the other defendants, remanded the case as to them with directions to dismiss (R., 290 and 293). This being an action at law where the value in controversy exceeds $20 and there being evidence entitled to consideration, showing that the city had valid defenses against the cross-answer of the Investment Co., the trial court in directing a verdict against the city and the circuit court of appeals in affirming that action deprived the city of its right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States. The suit being between citizens of different States involving exceeding $12,000, the Federal court had jurisdiction and this Court has jurisdiction to review any ruling of the circuit court of appeals or of the district court deemed erroneous.

Under Section 28 of the Judicial Code, it is the suit and not the separable controversy only that is removed to the Federal court. Therefore, if there existed a separable controversy authorizing the removal of the suit, the District Court of the United States acquired jurisdiction of the entire case (Barney *vs.* Latham, 103 U. S., 205; Brooks *vs.* Clark, 119 U. S., 502; City of Beaumont *vs.* Fall, 291 S. W., 202).

## Statement of the Case.

Gainesville is a Texas municipality incorporated as a city of exceeding 5,000 under a special act of the Legislature approved March 17, 1909, of which the courts take judicial notice (Special Laws of the 31st Legislature, 501 and 537) R., 131).

On the 20th of November, 1919, a contract was signed by the city and the Construction Co. (not conceded to be valid) (R., 138 concerning some paving to be done by the Construction Co. Under the contract, the city was to pay for the street intersections and for one-fourth of the other work, while the Construction Co. looked to the abutting property owners for the remaining three-fourths (R., 137).

It was contemplated that the city's part of the paving would amount to $50,000. The Construction Co. agreed to accept the legally issued warrants of the city at par for the city's proportion of the cost (R., 140), to be paid monthly on the first regular meeting of the council after the first day of the month, as the work progressed on the engineer's written estimates, the city reserving 10 per cent until final completion (R.,

156). The work was delayed for various causes and up to September 20, 1920, the city's part of the only paving done amounted to $3,000, for which the city, on the 6th day of April, 1920, issued three warrants numbered one, two and three, for $1,000 each (R., 251), payable in one, two and three years, respectively, which warrants were paid at maturity. On or shortly prior to September 10th, 1920, some understanding was had not shown on the record by which the city was to issue the remaining $47,000 of warrants in advance of the work. In furtherance of this understanding, H. W. Head on September 10th, 1920, signed and delivered to the city this obligation:

SHERMAN, TEXAS, September 10, 1920.

To the City Council,
Gainesville, Texas.

GENTLEMEN:

By virtue of an order from the Southern Surety Construction Company any moneys due said Southern Const. Co., from the city of Gainesville for work done and materials furnished under a contract for street improvements is to be paid to me, said amounts being payable in city warrants.

I understand it is now the purpose and intent of the City Council of Gainesville, Texas, to have issued to said Southern Const. Co. ten thousand dollars in warrants, these warrants to be properly endorsed by Southern Const. Co., and delivered to me.

In the event of any dispute, discrepancy or other contingency arising which might in any

way affect the amount of work done or materials furnished by Southern Const. Co. so as to in any way affect said ten thousand dollars in warrants I hereby agree to protect and indemnify said City of Gainesville, Texas, up to the sum of ten thousand dollars.

None of said money will be paid or credited to Southern Const. Co., except in such amounts as may be shown to be due under signature of Mayor of Gainesville, Texas, and when such amounts shall equal ten thousand dollars then this obligation to be discharged.

In case of suit arising out of the matters set out herein or in case suit becomes necessary to enforce any rights secured hereby, such suit shall be filed in Cooke County, Texas.

H. W. HEAD.

This obligation was guaranteed by the Surety Co. (R., 13). On October 4, 1920, H. W. Head signed and delivered to the city an obligation precisely like the above except the warrants contemplated amounted to $37,000 (R., 15), which obligation the Surety Company guaranteed (R., 15). Thereafter, on the 21st of September, 1920, $10,000 of warrants were issued (R., 171), and on the 5th of October, 1920, $17,000 (R., 167); and on November 2, 1920, $10,000. (R., 172); and November 16, 1920, $10,000 (R., 172); making in the aggregate $47,000. These warrants were issued pursuant to resolutions of the same date.

The warrants when issued were immediately delivered to the Construction Co., and were immediately endorsed and delivered by the Construction Co. to

H. W. Head, who immediately delivered them to the Investment Co., the latter paying Head therefor 95¢ on the dollar.

Early in January, 1921, the Construction Co. again began work (R., 179) and did paving amounting to $34,736.29, including the $3,000 paid for in April, 1920 (R., 19 and 179 and 181), and quit. Thus leaving undone $15,263.71 of the $50,000 which the city had attempted to pay for in warrants (R., 19). On October 11, 1921, the city brought suit against the Construction Co., H. W. Head, and the Surety Co., in the District Court of Cooke County, Texas, to recover $15,000 of them as the difference between the paving paid for and the paving received and against the Construction Co. for $4,090 for claims against it alone (R., 119). Default judgment was rendered against all defendants for $15,000, and against the Construction Co. alone for $4,090 for other things (R., 120). This judgment was reversed upon appeal by Head and the Surety Co. upon the ground that the petition did not allege sufficient facts to support it. (Head *vs.* City of Gainesville, 254 SW., 323.)

Upon the remand of the case to the District Court for Cooke County, Texas, the defendant, Head, answered and alleged among other things that the warrants in question were illegally issued, void, and of no value (R., 120). Thereafter, on December 10, 1923, the city filed its first amended original petition making the Investment Co. a defendant, and while still alleging that the warrants constituted valid legal and binding promises and obligations of the city prayed in

case the court held otherwise, that the warrants be canceled and declared void (R., 121).

The case was next removed to the District Court of the United States for the Eastern District of Texas, upon the petition of the Investment Co. claiming that there existed in the case a separable controversy. There being no question in the trial court or in the circuit court of appeals in reference to the sufficiency of the pleadings to raise the question discussed, we believe that their substance need not be stated here. By cross answer filed May 17, 1926, the Investment Co. sought to recover judgment of the city for past due warrants 7, 8, 9, 10, 11, and 12 for $1,000 each, and on past due coupons on all of the warrants (R., 100). These warrants, while among the first maturing, were the last issued having been authorized by the resolution of November 16, 1920 (R., 172). To this cross answer, the city replied by first amended supplemental petition alleging the facts connected with the transaction and that the Investment Co. not only acquired the warrants with notice of the real facts, but devised the scheme under which they were issued (R., 102). There was no question in reference to the sufficiency of the amended supplemental petition.

The warrants were for $1,000 each, numbered one to fifty, inclusive, dated November 20, 1920, bearing interest at the rate of 6 per cent per annum from that date, payable semi-annually. Two of the warrants were payable each year to March 1, 1930, and thereafter three were payable each year. The warrants (R., 245) were in the following form:

No. ——.

UNITED STATES OF AMERICA.

STATE OF TEXAS,
*County of Cooke:*

City of Gainesville Street Improvement Warrants.

Series ——.

This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to The Southern Construction Company Contractor, their assigns or bearer, on the 1st day of March, 19—, at the office of The Brown-Crummer Investment Company, Wichita, Kansas, the sum of

One Thousand Dollars

in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the 1st day of March, 1920, and semi-annually thereafter on September 1st, and March 1st of each year; and the City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest payable at the place above named, upon presentation and surrender of warrant or proper coupon.

This Warrant is one of a series of Fifty (50) inclusive, in the denomination of One Thousand

($1,000) Dollars, issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to the Southern Construction Company, their assigns or bearer for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and laws of the State of Texas, and pursuant to an ordinance passed by the City Council of said City of Gainesville, Texas, on the 2nd day of December, 1919, recorded in Book 6, at page 570 et seq., of the Minutes of said City Council.

The date of this warrant, in conformity with the ordinance above mentioned, is November 20, 1919.

And It Is Hereby Certified and Recited That all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation.

In Witness Whereof the City of Gainesville has caused the corporate seal of said City to be hereto affixed and this warrant to be signed by its Mayor, and countersigned by its City Secretary, and registered by the City Treasurer, as of the date last above written.

E. N. BLACKBURN,
*Mayor, City of Gainesville, Texas.*

Countersigned:
S. A. BRYAN,
*City Secretary,*
*City of Gainesville, Texas.*

W. H. GARMANY,
*City Treasurer,*
*City of Gainesville, Texas.*

The form of the interest coupons was as follows (R., 247):

No. —. $30.

On the 1st day of March, 1920, The City Treasurer of the City of Gainesville, Texas, will pay to the Southern Construction Company, their assigns or bearer, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas, the sum of Thirty ($30) Dollars, the same being six months' interest due that day on City of Gainesville, Texas, Street Improvement Warrant, Series ——, No. —, dated November 20, 1919, to which this coupon is attached and is a part thereof.

E. N. BLACKBURN,
*Mayor.*

S. A. BRYAN,
*City Secretary.*

At the time of the issuance of these warrants no work had been done. These so-called warrants are in fact bonds, and void because not authorized by the qualified tax-paying voters of Gainesville at an election held for that purpose.

Article 701 of the Revised Statutes of 1920, page 229, says:

> "The bonds of a county or an incorporated city or town shall never be issued for any purpose unless the proposition for the issuance of such bonds shall have been first submitted to the qualified voters who are property taxpayers of such county, city or town."

Section 1, Article 4 of the charter of the city says:

> "No bonds shall be issued for any purpose in excess of $2,500 unless an election be ordered by the mayor and city council, and if at said election the majority of the votes polled shall be in favor of creating such debt it shall be lawful for the city council to make the issuance of the bonds as proposed in the ordinance submitting the same at the election so held" (R., 129).

The provisions of Article 701 of the statute overrides the provision of the charter authorizing the issuance of bonds to the amount of $2,500, which prohibits their issuance in any amount without the consent of the qualified taxpaying voters (City of Beaumont *vs.* Fall, 291 S. W., 202; Foster *vs.* City of Waco, 225 S. W., 1104; 113 Tex., 352; Pulte *vs.* Keel, 297 S. W., 241; Robertson *vs.* Breedlove, 61 Tex., 316; San Patricio County *vs.* McClane, 44 Tex., 392; Brenham *vs.* German American Bank, 144 U. S., 173).

Section 16, Article 9, of the Charter (R., 130), and Article 545 of the Revised Statutes in force in 1909, and now Article 1083, page 322, of the Revised Statutes of 1925, says:

"Whenever the city council shall determine to make any such improvement, they shall cause an estimate to be made of the probable cost thereof by the city engineer, or by some other officer of the city, or by a committee of three aldermen; and such engineer or other officer or committee shall also report a full list of all lots or fractional lots, giving number and size of the same, and the number of the block in which situated, and the names of the owners thereof, if known, and such other information as may be required by the city council; and if there be a lot or fractional lot the owner of which is not known, the same shall be entered on said list as unknown. The officer or committee aforesaid shall enter on said list, opposite each lot or fractional lot lying and being on each side of the street, avenue or alley so to be improved as aforesaid, one-third of the estimated expense for such work or improvement on such avenue, street or alley fronting, adjoining or opposite such lot or fractional lot; and, on the acceptance and approval of said report and list by the city council, said amount shall be imposed, levied and assessed as taxes, and shall be a lien upon the property until the payment of the same."

There is no pretense that this preliminary estimate was made or that this statute was complied with.

Section 6, Article 7, of the charter says:

"The city council shall sit with open doors, shall keep a journal of its proceedings, which shall be public and constitute one of the archives of the city. The council shall act only

by ordinance, resolution or motion * * *. The ayes and nays shall be taken upon the passage of all ordinances or resolutions and entered upon the journal of its proceedings, and every ordinance, resolution or motion shall require on final passage the affirmative votes of a majority of all members of the city council present" (R., 131).

The minutes of the council show this:

"September 16th, 1919.—Alderman Thomas made a motion that the city engineer prepare plans and specifications and advertise for bids for paving the courthouse square and Commerce Street from California Street to Scott Street with brick. Motion carried." (Book 6, page 524.)

"On motion of Alderman Thomas, the council agreed to pave the intersections on any street that Mr. Levy, the paving contractor, can sign up the property owners on, and the council gave him an option on Lindsay Street and East and West California Street." (Book 6, page 524.)

"On motion of Alderman Barrett, the contract with Mr. R. G. Carraway, paving engineer, was ordered signed by the mayor and secretary when same was approved by the city attorney." (Book 6, page 528.)

This is all the record shows.

The failure to comply with the statute in reference to the estimate of the probable costs rendered the contract and all proceedings thereunder void (Frosh *vs.*

City of Galveston, 73 Tex., 401; City of Corsicana *vs.* Kerr, 89 Tex., 461).

Section 28, Article 2, of the charter says:

> "All contracts, of whatever character, pertaining to public improvements, or the maintenance of public property of said city, involving an outlay of as much as two hundred and fifty dollars ($250), shall be based upon specifications to be prepared and submitted to and approved by the mayor and city council, and after approval of the mayor and city council, advertisement for the proposed work, or matters embraced in said proposed contract, shall be made, inviting competitive bids for the work proposed to be done, which said advertisement shall be put in a daily newspaper not less than ten times. All bids submitted shall be sealed and shall be opened by the mayor in the presence of a majority of the aldermen, and shall remain on file in the mayor's office and be open for public inspection at least forty-eight hours before any award for said work is made to any competitive bidder. The council shall determine the most advantageous bid for the city, and shall enter into contract with the party submitting the lowest secure bid, but shall always in every advertisement of public work or contract involving as much as $250, reserve the right to reject any and all bids. Pending the advertisement of the work or contract proposed, specifications therefor shall be on file in the office of the mayor, subject to the inspection of all parties desiring to bid." (R., 126.) (Special Laws, 31st Legislature, 513.)

There is no pretense that this provision of the charter was complied with.

The motion of September 16, 1919, was that the city engineer prepare plans and specifications and advertise for bids for paving the courthouse square and Commerce Street from California Street to Scott Street with brick (R., 173).

The advertisement for bids and instructions to bidders show upon their face that plans and specifications had not been approved by the city council and were not on file in the office of the mayor subject to the inspection of all parties desiring to bid, but were in the office of the engineer and a copy could be procured by a deposit of $10 (R., 133, 134). There were never any plans and specifications approved or filed. The only ones among the papers or records of the council are the copies attached to the bids.

While the motion says "The courthouse square and Commerce Street from California Street to Scott Street," Dixon and Davis Streets were also paved (R., 179).

The specifications did not mention any street but merely specified the kind of material, work, etc. (R., 141 to 165), nor did the instructions to bidders mention any streets (R., 131-134), nor did the bids mention any streets (R., 134 to 137). The only thing on the city's record in reference to the acceptance of the bid of the Construction Co. is this, appearing on the minutes of November 19, 1919:

> "Alderman Thomas made a motion that the bid of the Southern Construction Company be

accepted as presented leaving off construction bond required and the contractor put up $5,000 in collateral satisfactory to the council and pave with brick on the square, Dixon Street to Broadway, Commerce Street to Scott Street, material to be left open, Dixon Street to M., K. & T. R. R., material to be left open and the mayor and secretary be authorized to make the contract with the Southern Construction Company. A yea and nay vote was taken and resulted in eight yeas and no nays'' (R., 164).

The warrants were fraudulently issued pursuant to a scheme devised by the Investment Company who acquired them with full notice. For $15,263.17 of such warrants the city has received no consideration. On the 19th of November, 1919, the day upon which the contract was awarded, the Investment Co., by J. E. Blaine, its agent, agreed to purchase the warrants from the Construction Co. at $.95 on the dollar (R., 207). The Investment Co. thereupon employed Harris, McCall & Graham, Dallas attorneys, to look after the matter. They prepared in duplicate the ordinance of December 16, 1919, confirming the contract and providing for the issuance of the warrants and on December 15, 1919, mailed them to the city secretary (R., 209). In this letter they instructed the secretary in reference to the passage of the ordinance and requested him to certify to the copy which they were enclosing and return it to them as a permanent record to be retained by the purchaser (R., 210). It is a justifiable presumption that Harris, McCall & Graham posted themselves in reference to what was done in order to be able to

pass upon the validity of the warrants. This ordinance of December 16, 1919, occupies pages 231 to 250 of the record. It recited that the contract was based upon specifications prepared and submitted to and approved by the mayor and city council which was untrue (R., 241). It further recites that the bids after being opened remained on file in the mayor's office open for public inspection for at least forty-eight hours before the contract was awarded to the successful bidder, which was untrue (R., 242). It further falsely recided that the Construction Co. had given bond in accordance with Section 29 of the charter, securing the faithful performance of the contract and securing the rights of subcontractors, materialmen and laborers (R., 243).

Section 29, Article 2, of the charter says:

> "The council shall require good and sufficient bond of the contractor with at least two good and sufficient sureties who shall be residents of the State of Texas" (R., 127).

Under Article 5161, page 1448, Revised Statutes, a contractor for public works and improvements is required before commencing work to execute the usual penal bond with additional obligation that such contractor shall promptly make payments to all persons supplying him with labor and materials in the prosecution of the work provided for in such contract. A penal bond is generally in double the amount involved and never less than the amount involved. The instructions to bidders required that the successful bidder should furnish bond in the amount of the bid from

a responsible surety company or from good and sufficient personal sureties (R., 133). The specifications and bid required a maintenance bond in the sum of 25% of the total cost of the improvement (R., 157). The bid of the Construction Co. bound the contractor to execute a construction bond for the performance and completion of the work and to keep the completed work in a state of repairs for five years (R., 134). After the bids were opened the bid of the Construction Co. was accepted, leaving off the bonds and substituting in lieu thereof collateral security of the value of $5,000, but the collateral was never put up. The contract contemplated expenditures by the city and abutting lot owners of exceeding $150,000, yet only $5,000 collateral was to be put up to secure the performance of this contract, payment for the work and material and the maintenance of the completed work for a period of five years. The contract as signed leaves out the construction bonds, the maintenance bond and the penal bond. The fact that these bonds were required of bidders certainly influenced their bids and caused them to bid higher than they otherwise would. The bonds and the agreement to maintain the work were parts of the contract bid on. The contract made must be the same as that bid on. (Dillon on Municipal Corporations, Vol. 2, Section 807, page 1213.)

Harris, McCall & Graham, after the ordinance of December 16, 1919, had been passed and approved, made material changes in the certified copy which had been sent to them as appears from their letter to J. E. Blaine, dated January 2, 1920, and directed that Blaine

see that the same changes were made in the original (R., 210). This letter Blaine sent from Wichita, Kansas, on January 8, 1920, to the city secretary and requested the secretary to look at the original and to be sure that the corrections enumerated were made (R., 212). The ordinance was passed and approved on December 16. Yet early in the following January, material changes were made in it by the attorneys for the Investment Co. and by the secretary at the solicitation of Blaine, the agent of the Investment Co. It seems that Harris, McCall & Graham were indifferent as to the real facts if things appeared regular on the record. On the 19th day of June, 1920, the Investment Co., through J. E. Blaine, its agent, entered into a contract with the city, in which the Investment Co. agreed to furnish the legal proceedings for the issuance of the warrants to the Construction Co. and to defray the expense of printing, as well as all other matters incidental to their issuance, in consideration of which the city agreed to pay to the Investment Co. 5% on all warrants, including the $3,000 issued in April, 1920 (R., 206). The resolutions of September 21, October 5, and November 2 and November 16 were prepared in Dallas in duplicate by Harris, McCall & Graham, the attorneys for the Investment Co., and were brought from Dallas to Gainesville by J. E. Blaine, the agent of the Investment Co. The carbon was used by the city and the original certified to and retained by Blaine. To the original resolution was attached affidavits to be made by the mayor and each alderman to the effect that they had inspected the paving and that it was

actually completed and the amount justly due. The council met at 7:30 at night and the resolutions were passed, the original certified and the affidavits made before adjournment (R., 171). Although the mayor was sick, these resolutions prepared at Dallas recited that he was present. When the council would adjourn, Levy of the Construction Co. and Blaine would go to the residence of the mayor and have him sign the papers (R., 184). The warrants as they were issued were endorsed by the Construction Co. and delivered to H. W. Head, who resided at Sherman, Texas. Head would draw upon the Investment Co. at Wichita, Kansas, for 95% of the principal of the warrants attached (R., 191, 193). Mr. Harris would send to the Investment Co. in every instance a copy of the record with his opinion endorsed. The 95% which H. W. Head received for the warrants never reached the city treasury. As these warrants were from time to time issued to the Construction Co., J. E. Blaine, its agent, was on hand and demanded and received the 5% which the city had agreed to pay (R., 214). The resolutions and the warrants for the 5% bear the same date (R., 214). The Investment Co. also demanded and received from the city the interest that had accrued on the warrants from November 20, 1919, to the time they were delivered by Head, which was something more than a year (R., 213). J. E. Blaine knew at the time the resolutions were passed and the warrants issued that the paving had not been done (R., 216).

The certified copies of the resolutions of September 21st, October 5th, November 2d, and November 16th,

produced by the witness Crummer, were certified to by S. A. Bryan, city secretary. These were typewritten with the exception of the blanks filled in with a pen. They are the originals of the carbon copies that were left with the council, and used by them. These resolutions were approved by the mayor upon the day of their passage and were certified to by the city secretary on the same day, and to each were attached the affidavits made on the same day by the mayor, aldermen and city secretary, before a notary public, and the certificate dated upon the same day in reference to the signatures of the mayor, secretary and treasurer. In other words, everything in the matter of certificates, affidavits and the like bear the same date as the passage of the resolution. The affidavits of the mayor, secretary and aldermen said that the statements contained in the resolutions were true and correct, and that the materials so furnished and the work so performed and covered by the estimate or claim had been by the council inspected and accepted and found to be in accordance with the contract and plans and specifications and had been determined by said council to be well worth the price agreed to be paid therefor as reflected in said statement of account or estimate, and that the City of Gainesville had received full value for the money represented by said warrants. To each of these transcripts was attached the certificate of W. M. Harris saying that he had examined the copy of the proceedings and the warrants and that in his opinion such proceedings show lawful authority and that he found the warrants to

have been properly executed and that in his opinion the warrants were valid and legally binding upon the City of Gainesville (R., 193 & 194).

Blanks were left in the typewritten resolutions sent from Dallas to Gainesville for the insertion of the estimates which the Construction Co. filled in by merely writing $1,700 for material furnished and work performed in one, and $10,000 in the other three (R., 169). The Investment Co. maintained correspondence with J. E. Blaine until the last warrants were paid for (R., 198). Neither J. E. Blaine nor any member of Harris, McCall & Graham was produced by the Investment Co. R. E. Crummer, the vice-president and manager of the Investment Co., was the only witness produced to show want of knowledge of the real facts. It was the duty of J. E. Blaine as representative of the Investment Co. to investigate and report on pending bonds and municipal issues (R., 195). Judge Harris looked after the transaction until it was completed (R., 195). Crummer testified: "I don't know what was in the contract between the city and the Construction Co." (R., 196). A letter from him to Blaine, dated June 18, 1920, shows that he did know the provisions of the contract (R., 203). The expression, "work performed and material furnished," as recited in the resolution did not strike him as peculiar (R., 196). He said he presumed the city officials prepared the resolution (R., 196). This he said though he had contracted to furnish the legal proceedings and his attorneys, Harris, McCall & Graham, prepared the resolutions and his agent Blaine brought

them to Gainesville and presented them to the council. There having been no election, these warrants must be sustained, if at all, as ordinary warrants upon the treasury to pay claims audited and allowed. Such warrants are not negotiable under the law merchant and are subject to any defense which the city has, such as fraud, illegality or failure of consideration, although transferred to someone who had no actual notice (Dillon on Municipal Corporations, Vol. 2, Sec. 856). Wall *vs.* County of Monroe, 103 U. S., 74; Mayor *vs.* Ray, 19 Wall., 468; Watson *vs.* City of Horon, 79 Fed., 449; San Patricio County *vs.* McClane, 44 Tex., 392; Lane *vs.* Hunt County, 35 S. W., 10; Shock *vs.* Colorado County, 315 S. W., 61; Lasater *vs.* Lopez, 110 Tex., 185; 217 S. W., 376; Robertson *vs.* Breedlove, 61; Tex., 316; Allan *vs.* Abernathy, 151 S. W., 348.

The provision of the charter in reference to approved plans and specifications are mandatory, and the failure to comply therewith renders the contract and the proceedings thereunder void. (Dillon on Municipal Corporations, Vol. 2, Secs. 806 and 807.) Limestone County *vs.* Knox, 234 S. W., 131.

Section 28, Article 2, of the charter, *supra,* says that bids, after being opened, shall remain on file in the mayor's office for public inspection at least forty-eight hours before any award for said work is made to any competitive bidder (R., 127). The minutes show that the council convened at 7:30 p. m. on November 18, 1919, and opened the bids (R., 128), and laid them over until November 19 and adjourned to meet at 7:30

p. m. on that date (R., 164), and that the council did meet at 7:30 p. m. on November 19 and awarded the contract to the Construction Co. (R., 164). The prescribed delay of forty-eight hours after the opening of the bids was intended to give time for inspection and consideration and to allow any citizen or other person interested to interpose any objections thereto. It is a mandatory provision that the council could not disregard at its pleasure.

The specifications, instructions to bidders, and the contract says: "The contractor in the construction of the work shall give preference in employment to citizens of the aforesaid city, and when citizens of said city are not available, shall give preference to citizens of the State of Texas" (R., 146). This provision is well calculated to hamper the contractor and increase the costs of the work. The charter of the city, the State statute, and the common law confer upon municipalities no authority to insert such provision in contracts. "A contract prohibiting the employment of any person or persons other than native born or naturalized citizens of the United States is illegal." (Dillon on Municipal Corporation, Vol. 2, Sec. 808).

The facts giving rise to the questions above discussed were alleged in the pleading and sustained by the evidence. They were also urged upon the trial court by requested instructions and by objections to the instructions given, reserved in the bill of exception and presented on error to the circuit court of appeals by specifications and brief.

Section 16, Art. IX, of the charter (R., 130), and Article 544 of the then Revised Statutes, which is Article 1082, page 322 of the present statute, says in reference to the costs of street improvements: "The city council shall pay one-third and the owner of the property two-thirds thereof, except at the intersection of streets, from lot to lot across the streets either way shall be paid for by the city alone. Said costs shall be assessed on the property fronting on said street so improved, to be collected in equal annual payments, not less than five in number. All moneys collected from these assessments shall be appropriated exclusively to the payment of the bonds issued for the payment of the costs of said improvement." Under the ordinance and contract under consideration three-fourths of the costs was assessed against the abutting lot owners, payable one-third on demand and one-third in one, and one-third in two years from date (R., 152 and 153).

**Specification of Errors.**

The specifications of error filed in the trial court and presented to the circuit court of appeals, and relied on here are as follows:

1

The court erred in refusing to give the first instruction requested by the plaintiff as follows:

> "The treasury warrants issued by the City of Gainesville to the Southern Construction Company described in the pleadings are void and of no validity, because issued without the

consent of the qualified voters of the city of Gainesville granted at an election held for that purpose."

2

The court erred in refusing to give the second instruction requested by the plaintiff as follows:

"The contract between the City of Gainesville and the Southern Construction Company and all proceedings thereunder are void, because said contract, among other things, was made without any preliminary estimate of the cost of the proposed street improvement as prescribed by the charter and the statute."

3

The court erred in refusing to give the third instruction requested by the plaintiff as follows:

"Under Sec. 28, Art. 2 of the Charter of the City of Gainesville contracts are required to be let to the lowest responsible bidder, after the adoption of specifications and the giving of notice. The contract in question having been changed in material respects after the bids were received, without being re-opened to competitive bidding as changed, is void."

4

The court erred in refusing to give the fourth instruction requested by the plaintiff as follows:

"The warrants issued by the City of Gainesville to the Southern Construction Company

are not negotiable instruments, and anyone acquiring such warrants takes subject to any defense that the city would have against them in the hands of the original holder."

5

The court erred in refusing to give the fifth instruction requested by the plaintiff as follows:

"Under the charter of the City of Gainesville in respect to street improvement the city could not pay for the paving of streets by the issuance of long-time warrants; but if without funds to pay for such improvement, the money therefor could not only be raised by the issuance of bonds pursuant to the consent of the qualified voters granted at an election held for that purpose; and that not having been done in this case the contract and the warrants issued pursuant thereto are illegal and void."

6

The court erred in refusing to give the sixth instruction requested by the plaintiff as follows:

"The instructions to bidders and the specifications and contract in question required that the contractor in the employment of labor should give preference to the citizens of Gainesville; and in default of citizens of Gainesville, to citizens of the State of Texas. These provisions were illegal and interfered with fair competition and rendered the contract and all proceedings thereunder void."

7

The court erred in refusing to give the seventh instruction requested by the plaintiff as follows:

> "The unquestioned proof shows that the City of Gainesville received no consideration for $15,263.73 of the Series of $50,000 of warrants issued by it, and that said excess of warrants over the amount of paving done are without consideration and uncollectible."

8

The court erred in refusing to give the eighth instruction requested by the plaintiff as follows:

> "In the acquisition of warrants notice to the agent is notice to the principal, and if J. E. Blaine knew that the warrants in question were issued before the paving, as to which each set of warrants applied, was done and were issued when nothing was due under the contract, then the Brown-Crummer Company is in no better position than the Southern Construction Company, and the Brown-Crummer Company acquired such bonds, if at all, subject to all the defenses the City of Gainesville had against them."

9

The court erred in refusing to give the ninth instruction requested by the plaintiff, as follows:

> "If J. E. Blaine was the agent of Brown-Crummer Company in the purchase of the warrants in question and during said agency and

before Brown-Crummer Company received the warrants and paid therefor said Blaine knew that they were issued for paving not done and in advance of the performance and acceptance of the work, then the Brown-Crummer Company acquired such warrants subject to all the defenses the City of Gainesville had against the same."

10

The court erred in refusing to give the tenth instruction requested by the plaintiff, as follows:

"If the evidence shows that J. E. Blaine was the agent of Brown-Crummer Company, you are then instructed that the knowledge of Blaine would be the knowledge of the Brown-Crummer Company. You are further instructed that in order for Blaine to have been the agent of Brown-Crummer Company it was not necessary for him, at the time of the transactions, to have been in their employ, receiving a salary, but if they entrusted him with the handling of the transactions with regard to the warrants and the purchase of the same, and carrying out these transactions, then you are instructed that this was sufficient to constitute him an agent."

11

The court erred in refusing to give the eleventh instruction requested by the plaintiff, as follows:

"It appears from the evidence that Mr. Harris was the attorney for Brown-Crummer Company in preparing sundry papers in the case,

by virtue of which certain ordinances were passed and the warrants issued; you are instructed that the knowledge of Mr. Harris was the same as the knowledge of Brown-Crummer Company."

12

The court erred in refusing to give the twelfth instruction requested by the plaintiff, as follows:

"The contract for the paving and the ordinances under which it was made prescribed that the abutting lot owner shall pay for three-fourths of the cost of the improvement in front of his property, in three annual installments, bearing interest at the rate of 8 per cent per annum, while the charter required that the abutting lot owner should pay for only two-thirds of the cost of improvement in front of his property, and that the assessments therefor should be payable in equal annual installments, not less than five in number; the failure of the contract and ordinances to comply with the charter in these respects renders the contract and all proceedings thereunder void."

13.

The court erred in refusing to give the following instruction requested by the plaintiff:

The contract between the city of Gainesville and the Southern Construction Co. is void because the unquestioned proof shows that the contract was awarded within less than forty-eight hours after the bids were opened.

14.

R. E. Crummer being an interested party, the jury were the sole judges of his credibility and did not have to accept his evidence as true, and the court therefore erred in instructing a verdict in favor of the Brown-Crummer Investment Company, based solely upon the testimony of said Crummer.

15.

The warrants in question not being negotiable instruments, the court erred in assuming that the Brown-Crummer Investment Co. was a *bona fide* holder, entitled to the protection accorded to *bona fide* holders of negotiable paper, and therefore erred in instructing a verdict in favor of said company.

16.

W. M. Harris, being the agent of the Brown-Crummer Investment Co. to furnish the proceedings in reference to the issuance of the warrants, and to see that everything was in proper shape, notice to him was the same as notice to the Brown-Crummer Investment Co., and the court therefore erred in instructing a verdict in favor of said company.

17.

J. E. Blaine, being unquestionably the agent of the Brown-Crummer Investment Co. in the purchase of the warrants in question, and there being abundant evi-

dence tending to show that said Blaine knew that the warrants were issued before the acceptance or performance of the work, and that the recitals in the resolution for their issuance were false, the court erred in instructing a verdict in favor of the Brown-Crummer Investment Company.

18.

The unquestioned proof showing that the city of Gainesville lacked something over $15,000 of receiving the paving that should have been constructed to entitle the Southern Surety Co. to the $47,000 of warrants, and there being no proof showing or tending to show that H. W. Head paid out upon orders approved by the mayor of Gainesville sums of money aggregating $47,000, the court erred in instructing a verdict in favor of the defendant Head and the Southern Surety Co.

19.

There being no proof that H. W. Head paid out any sums of money upon orders approved by the mayor of Gainesville, the court erred in instructing a verdict in favor of his executor.

20.

The warrants sued on being the last issued, the plaintiff received no consideration therefor or the consideration has wholly failed, therefore the court erred in directing a verdict against the plaintiff on said warrants.

21.

The court, in directing a verdict in favor of the Brown-Crummer Investment Co., deprived the plaintiff of its right of trial by jury, guaranteed by the Seventh Amendment to the Constitution of the United States.

22.

The circuit court of appeals erred in holding that it was without jurisdiction of a controversy between the city of Gainesville and the Southern Surety Company and H. O. Head, as executor of H. W. Head.

## ARGUMENT.

"A warrant," says Judge Dillon, "is a command of the council, board, or official whose duties it is to pass upon the validity and determine the amount of a claim against the municipality to the treasurer to pay money out of any funds in the city treasury, which are or may become available for the purpose as specified, to a designated person whose claim therefor has been duly adjusted and allowed." (Dillon, Volume 2, Section 850.)

"Being simply a means of paying a debt, it is necessarily implied that a valid debt or obligation of the corporation exists for which a warrant may be drawn. The warrant does not constitute a new debt, or evidence of a new debt, but is only the prescribed means for drawing money from the municipal treasury to pay an existing debt. It may also be laid down that, as a

general rule, the power to issue a warrant does not exist until the audit and allowance of the claim in the manner prescribed by statute." (Dillon, Volume 2, Section 851.)

Warrants cannot be issued and sold by the municipality in order to acquire money for any particular purpose. That is the office of bonds. With the consent of the qualified tax-paying voters, granted in an election held for that purpose, bonds can be issued and sold in order to acquire money to improve streets and to do other things of a public nature. Warrants were never intended for any such purpose, and their attempted use for that purpose is but an evasion of the law against issuance of bonds. (Ashby *vs.* James, 226 S. W., 737.)

In disregard of good business methods and of a mandatory statute, the council entered into a contract with the Southern Construction Company without exacting the bonds required by law. Had the bonds been given, the Construction Company, although insolvent, would have had credit and could have complied with its contract, but, being insolvent and not being backed by any bond, it was without credit. The warrants were issued in advance of the work, with the expectation that they would be sold and the proceeds used by the Construction Company to pay for the work as it progressed. The warrants were not issued in settlement of accounts that were due, but were issued in an attempt to finance the insolvent Construction Company and enable it to go ahead with the paving. In other words, the warrants were issued and sold for the purpose of raising

money to pay for the paving as it progressed—a purpose for which warrants were never intended, and which could only be accomplished by the issuance of bonds.

The circuit court of appeals says that the warrants were *escrowed* with H. W. Head, but not so. The warrants were issued, delivered, sold and put in circulation. An instrument that has been delivered and put in circulation cannot be *in escrow*.

Among the cases relied on by the Investment Co. is Graves *vs.* M. Griffin O'Neil & Sons *et al.*, 189 S. W., 778. That is a decision of an intermediate court, entitled to very little weight as authority. Besides, it was an appeal from an order dissolving a temporary injunction, the granting or dissolving of which rests largely in the discretion of the court. In addition to this, the petition was not properly verified, and after so holding anything further was *obiter dictum* merely. In that case, the so-called warrants were issued in advance of performance, and the ordinance or resolution evidently recited performance. It is strange that the court did not perceive that anything is a fraud upon the law where false recitals are necessary to give it the appearance of validity. The decision is in conflict with the subsequent cases of Foster *vs.* City of Waco and Pulte *vs.* Keel, *supra*.

City of South Houston *et al. vs.* Carman, 6 Fed., 358, is also relied on. The question there was whether the inhabitants, after the dissolution of an illegally organized municipality, were liable for the debts contracted by it while a going concern. That question is not in-

volved here. It will be noted that J. L. Arlitt devised that scheme, and he has established quite a reputation as a handy man where aldermen and county commissioners are seeking to evade the law.

Slayton & Co. *vs.* Panola County, 283 Fed., 330, is another case relied on. That was another fraudulent scheme devised by J. L. Arlitt, and a grievous fraud was perpetrated upon the taxpayers of Panola County. That is one of the recent cases seeking to make the law of negotiable instruments apply to illegally issued warrants.

We do not see that Scott County, Arkansas, *vs.* Advance-Rumley Thresher Co., 288 Fed., 739, has any relevancy to the question. In that case the question of innocent purchaser was not involved, for the court conceded that a purchaser of a warrant takes subject to all defenses that could be urged against the original holder. (See page 745 of that opinion.) In Texas it has frequently been held that an unauthorized act can not be ratified, for the self-evident reason that where there is no power to do, there can be no power to ratify. (City of Bryan *vs.* Page, 51 Tex., 532.)

Grimes County *vs.* W. L. Slayton & Co., 262 S. W., 209, cited by the Investment Co., is another decision of an intermediate court. In that case J. L. Arlitt figured, as usual. There new warrants were issued in lieu of previous warrants, irregular but not void. That case has no bearing upon this. City of Belton *vs.* Brown-Crummer Investment Co., 17 Fed., 2d Series, 70, cited by the other side, involved some refunding warrants, and nothing is there decided in any manner affecting

this case. Evansville *vs.* Dennett, 161 U. S., 434, relied on by the other side, relates to negotiable bonds and has no application to treasury warrants.

Lasater *vs.* Lopez, 110 Tex., 179, is relied on by the other side. That case involved the validity of county warrants issued in settlement for work done on the public roads of the county. A constitutional and statutory duty rested on the county to provide roads, but, unless authorized by statute, the county could not issue negotiable bonds or paper. The county could, however, issue warrants or other evidence of any debt it really owed, but such warrants or evidence were subject to any defense which could be made against them in the hands of the original holder.

As shown by the opinion of the court of civil appeals in the same case, 202 S. W., 1041, the warrants were payable in yearly installments extending over a period of sixteen and one-half years and had attached to them interest coupons representing semi-annual interest at the rate of 6 per cent per annum.

The opinion shows that since the beginning of government it had been the duty of the commissioners' court to establish and maintain public roads, but the opinion is wrong if it intends to say that prior to the inhibition against the issuance of bonds without the consent of the taxpayers, long-time warrants with interest coupons attached were ever employed.

Section 1, Article IV, of the charter says:

> "The city council of the city of Gainesville shall have power and authority by ordinance duly passed, if it so elects, to borrow money on

the credit of the city for permanent improvements, for public buildings, for the permanent improvements of its streets, avenues, alleys, public grounds, building of sidewalks, macadamizing, remacadamizing, paving and repaving of streets, alleys, avenues and public grounds, and for the purpose of providing the city with funds for the ownership of public utilities, including water, light, sewer and gas works; and the city council may issue bonds for the city of Gainesville for all or any of the above purposes to any amount not exceeding $150,000 in any one year; provided, that in addition the said city is expressly authorized to issue bonds for the purpose of refunding the bonds of the city previously issued; provided, that the bonds be refunded at the same or a lower rate of interest than the bonds proposed to be retired draw. It is further provided that debt shall never be created by the city of Gainesville unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent thereon.

"No bonds shall be issued for any purpose except the purposes above named, which shall not exceed $150,000 for any one year and for the purpose of refunding bonds previously issued.

"No bonds shall be issued for any purpose in excess of $2,500 unless an election be ordered by the mayor and city council, and if at said election the majority of the votes polled shall be in favor of creating such debt, it shall be lawful for the city council to make the issuance of the bonds as proposed in the ordinance submitting

that the contractor had furnished labor and material in the amount of the estimate, that same had been inspected and accepted by the Council to be in accordance with the contract, plans and specifications, and determined by the Council to be well worth the amount reflected in the estimate, and that the claim in the estimate had been audited and found correct and had been approved, and that the City had received full value and consideration for the warrants mentioned in the resolution, and thereupon authorized and directed the delivery of said warrants. On each of said occasions the Mayor, Alderman and officials of the City of Gainesville further furnished to Brown-Crummer Investment Company an affidavit to the effect that the statements contained in the respective resolutions were true and correct, and that the work and material furnished had been inspected by the Council and accepted and found to be in accordance with the contract, plans and specifications and well worth the price reflected in the estimate, and that the City of Gainesville had received full value for the money represented by the warrants. To be sure, the form of these papers was furnished to the City by Brown-Crummer Investment Company according to the usual practice in the business, and according to the requirements of the contract for the purchase of the warrants.

It was but ordinary prudence on the part of Brown-Crummer Investment Company to require these supplemental affidavits, especially in view of the fact known to the City that its attorney passing on the warrants was not located in Gainesville, but resided in Dallas, Texas, and on account of the further fact, also known to the City, that Mr. Crummer, whose business it was to receive and pay for the warrants, was located at Wichita, Kansas. The contents of these papers furnished to the City fully disclosed to the City the conditions upon which Brown-Crummer Investment Company was willing to pay for the warrants. Furthermore, the City was explicitly advised by several letters already mentioned, received direct from said attorney, W. M. Harris, and from Mr. Crummer, that the warrants would be accepted and paid for only from time to time upon estimates as the job progressed. Nevertheless, the City adopted the resolutions above mentioned, and the City officials supported same by the affidavits above mentioned, and the City issued the warrants containing the representations above mentioned, and all of these from time to time as contemplated by the City were attached to the drafts, which were presented to Brown-Crummer Investment Company for payment. The undisputed evidence is that Mr. Crummer in each instance looked over the warrants and examined all of the documents

accompanying the drafts, and believing the recitals and representations contained in the warrants and in said documents to be true, and relying upon the truth of same, and relying also upon the accompanying approving opinions of his attorney, W. M. Harris, paid for the warrants in behalf of Brown-Crummer Investment Company, and would not have paid for them had he known of the existence of any of the alleged infirmities.

As to the contention that Brown-Crummer Investment Company had knowledge of any of the alleged infirmities, we will review the evidence bearing thereon after first presenting the authorities governing the above facts.

## AUTHORITIES

In the following cases it has been held explicitly that the doctrine of estoppel applicable to such facts involves a question of general commercial law upon which the Federal Courts will be governed by their own conception of the jurisprudence of the subject. See:

Presidio County vs. Noel-Young, 53 Law Ed. 402, 212 U. S. 58;

Swift vs. Thaison, 16 Pet. 1;

Oates vs. First National Bank, 1 U. S. 239, 246;

Burgess vs. Seligman, 117 U. S. 20, 33, 34;

Town of Pana vs. Bowler, 107 U. S. 529.

We now submit a succession of clear and powerful decisions emphatically applying the doctrine of estoppel against municipalities in cases similar to the one at bar. It will be noticed that many of these are Federal decisions, among them being a number of decisions of the Supreme Court of the United States, but it will also be noticed that the courts of this State have adopted and followed the jurisprudence of the Federal courts on the subject:

In Evansville vs. Dennett, 40 L. Ed. 760, 161 U. S. 434, the City was held estopped as against a bona fide purchaser of bonds from asserting that the bonds were not issued upon a petition of two-thirds of the resident freeholders of the City, and it was held that the purchaser could rely upon the recitations in the bonds that all necessary proceedings had been had in order to make them valid, and was not required to go behind the certificate upon the face of the bond to ascertain whether the proceedings of the City disclosed any defect in the bond, saying:

> "As therefore, the recital in the bonds import compliance with the City's charter, purchasers for value having no notice of the nonperformance of the conditions precedent were not bound to go behind the statute conferring the power to subscribe, and to ascertain by an examination of the ordinances and records

of the City Council whether these conditions have in fact been performed."

In Waite vs Santa Cruz, 46 L. Ed. 552, 184 U. S. 302, the bonds in question contained recitals substantially identical to those contained in the warrants in this case. If the ordinance authorizing the warrants had been examined by the purchasers, it would have disclosed a portion of the bonds invalid.

The U. S. Supreme Court said:

"The City of Santa Cruz had power, under the Constitution and laws of California, to refund its outstanding indebtedness, evidenced by bonds and warrants. The nature and extent of such indebtedness were matters peculiarly within the knowledge of its constituted authorities. When, therefore, the refunding bonds in suit were issued with the recitals therein contained, the city thereby represented that it issued them under and in pursuance of and in conformity with the act of 1893 and the Constitution of the state. As nothing on the face of the bonds suggested that such representations were false, purchasers had the right to assume that they were true, especially in view of the broad recital that everything required by law to be done and performed before executing the bonds

had been done and performed by the city. As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds."

In Presidio County vs. Noel-Young Bond Company, 53 L. Ed. 402, 212 U. S. 58, the United States Supreme Court again applied the same doctrine where the bonds contained similar recitations on their face, and the defect claimed was that **the bonds had been issued in excess of Constitutional authority and in violation of certain conditions precedent.**

In the City of South Houston versus Carman, 6 Fed. (Second Series), 358, the defects claimed among others were that South Houston exceeded its constitutional limit in levying taxes with which to pay the warrants, and also that the City got only 85c on the dollar for the warrants. The entire proceedings of the City were false and fraudulent from one end to the other, but con-

tained recitations and representations which, on their face, disclosed a legal and legitimate transaction. The securities involved were non-negotiable warrants, and it will also be noticed that they were in substantially the identical form as the warrants in this case. The warrants came into the hands of a party who had no knowledge of the defects. The Court held the City liable to such purchaser, saying:

> "Notwithstanding all this, Kidder & Company and the plaintiff in this case cannot appear in any other guise than that of innocent purchaser for value without notice."

As to the price which the City received for the warrants, the Court said:

> "It is true the warrants were sold at a considerable discount, but doubtless many obligations of small towns are sold at an actual discount of 15%, and the discrepancey is not so great as to be unconscionable."

Here, then, is a decision in which the instruments are non-negotiable warrants in any sense of the law merchant, and in which defects existed which would have rendered them uncollectible in the hands of one taking them with knowledge of the defects, and yet on account of the recitation and representations in the proceedings the City was held liable to an innocent purchaser.

Again, in Slayton & Company versus Panola County, Texas, 283 Federal, 330, the County had exhausted its constitutional power to levy taxes for road purposes. Desiring, nevertheless, to obtain money for roads, the County officials passed fraudulent proceedings in which it was recited that the County was indebted to Arlitt as evidenced by "warrants heretofore issued in payment of sundry claims", etc., and authorized the issuance of funding warrants to take up said alleged existing indebtedness. In fact, there was no such pre-existing indebtedness, and the whole scheme was a fabrication from one end to the other to circumvent the constitutional limitation upon the power of the County to levy taxes for further road money. The funding warrants were sold directly to W. L. Slayton at a discount of about 10 per cent. Slayton had no knowledge of any infirmities in the warrants which were non-negotiable instruments in substantially the identical form as those involved in this case, and which contained substantially the identical recitations and representations as the warrants in this case. The warrants when bought by Slayton were accompanied by certified copies of the proceedings, and by supporting affidavits furnished by the City officials in this case. The purchaser, as in this case, caused the validity of the instruments to be submitted to an attorney, and bought same

believing the representations and recitations above mentioned to be true. The Court first pointed out that the warrants are non-negotiable, saying:

> "The warrants themselves are not negotiable as that term is used in the law merchant, and it follows, therefore, that as regards their commercial status, any defense that the county may have can be asserted against the plaintiff herein."

The Court put then the following question:

> "Whether in a state of affairs such as outlined above a county can be permitted to urge the facts; that is, whether the county is estopped from claiming that the orders on which these warrants are based are void and then repudiate the obligations resulting from them."

Replying to this question, the Court held that although the warrants are not negotiable instruments, nevertheless the county officials in the discharge of duties entrusted to them by law had been guilty of conduct and made representations upon which the purchaser of the warrants had relied in buying them, and that to such facts the law attaches the old doctrines of virtue and honesty usually called estoppel, which forbids the County from investing its officers with authority to act for it in business relations and then evad-

ing the legal consequences of what they have done.

The Court said:

> "In using the power thus delegated to them, the Commissioners were transacting the routine business or exercising what some of the courts them the 'proprietary powers of the County.' The authorities are practically unanimous that as regards such routine or business engagements the doctrine of estoppel applies to municipal corporations just as to the individuals."

A very important recent decision in Texas is the case of W. L. Payne vs. First National Bank of Columbus, 291 S. W. 201, decided by Section "A" of the Commission of Appeals of this State, and approved by the Supreme Court of this State on February 9th, 1927. In that case warrants in substantially the identical form to those involved in the case at bar, were issued by the City ostensibly for the purpose of paying a certain contractor for certain bridge and street improvements, and appropriate proceedings were simulated for the purpose of making the transaction appear legal on its face in order that the warrants might be sold by the contractor in behalf of the City and the proceeds of sale used by the City itself in building the improvements. The con-

tractor received the warrants and sold them to one J. L. Arlitt for 85c on the dollar, and the proceeds were turned over to the City. Arlitt bought the warrants with full knowledge of the real facts, but they were finally bought by the First National Bank of Columbus, which was innocent of any infirmities. The bank sued the City to enforce collection of the warrants. Among other things it was contended that the real purpose for the issuace of the warrants being to borrow money, the warrants were void, and because the warrants are not negotiable instruments, they were subject to such defense in the hands of the bank. The Court said:

> "A proper disposition of this case does not require a consideration of the question as to whether or not the warrants are void for lack of authority in the city to borrow money in the manner it did, and a decision of that question is pretermitted. For even though the city were not authorized to borrow money as it did, it does not follow that the city may avail itself of that defense here.
>
> "The city, by virtue of Articles 854 and 857 of the Revised Civil Statutes of 1911, was expressly authorized to construct bridges and improve streets. The authority given by these statutes includes an implied authority to make

such improvements on credit; and to issue interest bearing warrants for the deferred payments of the price. Lasater vs. Lopez, 110 Tex. 179; Bridges vs. Lampasas, 249 S. W. 1083 (writ refused).

"The warrants are non-negotiable instruments. The general rule is to the effect that an assignee of a non-negotiable instrument takes it subject to all defenses held by the debtor. To this general rule there is a qualification which is aptly stated in 5 Corpus Juris, p. 966, in the following language:

> 'The general rule that an assignee acquires no greater rights than his assignor, is subject to the qualification that the debtor may by his representations or conduct estop himself to set up against the assignee defenses which were available to him against the assignor.'

"This qualification to the rule, in its application to the individual citizen, is founded in the soundest principles of equity. 2 Pm. Eq. Jur., Secs. 704 and 820; 2 R. C. L. p. 613; Cowdrey vs. Vandenburgs, 101 U. S. 573; Fugate vs. Hartford, 3 Litt. (Ky.) 263; Springle vs. Morrison 3 Litt. (Ky.) 52; Follett vs. Reese, 20 Ohio, 546; Jones vs. Hardesty, 10 Gill & J. (Md.) 404; Grisler vs. Powers, 81 N. Y. 57; Lee vs. Kirkpatrick, 14 N. J. Ch. 264.

"In determining whether a municipal corporation is subject to a particular case to estoppel restrictions, it is necessary to ascertain the scope of authority of the city agency through which the misrepresentation of facts was made and the relationship of the misrepresentation to the execution of that authority. In the instant case the city, through its council, had authority to construct bridges and improve streets; and when such improvements were made to issue warrants to the city to cover the cost thereof."

After quoting with approval from Slayton vs. Panola County, supra, the Court continued:

"In the present case the bank bought the warrants in good faith for a valuable consideration without notice of the real facts, and in reliance upon the truth of the recitals of the warrants and the several ordinances relating to their issuance. As against the bank, the city was estopped from asserting a defense based upon facts at variance with such recitals."

The above decision, approved by the Supreme Court of this State, is an explicit adoption of the doctrine of estoppel based on recitals in non-negotiable warrants. It will also be noticed the Court affirmatively treats the warrants in that

case, substantially identical in form to the warrants in this case, as being warrants and non-negotiable, but nevertheless enforces the doctrine of estoppel against the municipality.

Another Texas case is Grimes County vs. W. L. Slayton & Company, 262 S. W. 209, where the principle is asserted that where there is a total want of power by a County to issue warrants under any circumstances, the County cannot be estopped from pleading such total lack of power, but where the County under any circumstances, has power to issue warrants, and issues warrants under proceedings which are irregular, or under circumstances which are improper, but not totally ultra vires from a complete lack of any power whatever under any circumstances, the County can be estopped, if the facts justify, from questioning their validity as against a purchaser innocent of alleged defects.

In Scott County vs. Advance-Rumley Thresher Company, 288 Fed. 739, warrants were issued for road machinery without a proper appropriation having been made to pay for same as required by law. The warrants came into the hands of a purchaser who did not know of the defect. The Court pointed out that the County had the general power to attend to road matters and could at least impliedly have made a contract to purchase the road machinery provided a proper appropria-

tion had been made and the provisions of the law complied with. Even though the warrants were non-negotiable instruments, the Court held that the doctrine of estoppel applied to the county.

In Eyer & Company vs. Mercer County, 292 Fed. 292, the County gave its **non-negotiable note** for $50,000.00 in "anticipation of taxes for 1921 for County purposes", and the note provided that the proceeds thereof should be turned into the general fund of the County. The defect urged against the note was that there was an absence of power to borrow the money for which it was given or to execute the note **because there had been no previous assent to the creation of such indebtedness by the voters of the County as required by Section 157 of the Constitution of Kentucky.** The note, however, contained recitals and representations almost identical to the recitals and representations contained in the warrants in this case, to-wit:

> "Each and every act, condition and thing required to be done, to have happened and to be performed, precedent to and in the issuance of these notes, has been done, has happened and has been performed, in full and strict compliance with the Constitution and laws of the State of Kentucky, etc."

It was urged that the doctrine of estoppel

against municipalities has relation only to recitals in negotiable bonds. Replying to this contention the Court said:

> "The law as to the effect of recitals in the written obligations of municipalities has relation solely to negotiable bonds and not to such an obligation as that involved here. No authority is cited in support of this position. What is relied on is the fact that the cases in which the law has been applied have very largely been cases involving negotiable bonds. Its application in such cases, however, has not been limited to subsequent purchasers of such bonds from the original holders. It has been held applicable to the original holders thereof. In the case of Douglas County v. Bolles, 94 U. S. 104, 24 L. Ed. 46, the Supreme Court, through Mr. Justice Strong, said this:
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> > 'And still more, the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pretense that he had notice of anything that should have made him doubt their validity. Why was he not a bona fide purchaser for value? The law is undoubted, that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights.'

"Such being the case, what possible difference can the character of the obligation which one who loans money to a municipality receives in return therefor make as to its validity? Is not one kind of obligation just as valid as another? The ground of the estoppel is that the creditor has parted with his money or other consideration on the faith of the truth of an authorized representation as to a material fact, and, such being the case, it would be inequitable thereafter to permit the municipality to dispute its truth. And this applies whatever may be the nature of the obligation executed on behalf of the municipality.

"In the case of Citizens' Savings Bank v. City of Newburyport, 169 Fed. 766, 95 C. C. A. 232, the law as to estoppel because of a recital was applied to a note, and in the case of W. L. Slayton Co. v. Panola County, Tex. (D. C.) 283 Fed. 330, to a county warrant."

In the above case, therefore, it was emphatically held that the doctrine of estoppel applies to recitals in non-negotiable instruments as well as to recitals in negotiable instruments for the reason that the ground of the estoppel is the parting with money on the faith of the truth of an authorized representation as to a material fact, and has nothing to do with whether the representation

is contained in a negotiable or non-negotiable paper. Also it will be noted that the case of Slayton vs. Panola County, supra, is cited with approval in the above decision. And so, the County was held estopped, although the defect claimed was a very fundamental one, being a failure to comply with the requirements of the Constitution of the State that such indebtedness could not be created without previous assent of the voters of the County. Whether such assent of the voters had been obtained was held to be a fact matter, and the recitations contained in the note were held broad enough to embrace the representation that the election had been held.

In Cuddy vs. Sturtvant, 190 Pac., 909, the validity of non-negotiable municipal obligations was questioned. The obligations were sold at an unlawful discount. They bore on their face substantially the same recitals as are contained in the warrants in this case. Nothing could be added to the following language of the Court:

> "This court has announced the doctrine that the same rule or standard which measures the rights and liabilities of individuals should be applied to the business contracts of municipal or public corporations. Since it is not the negotiability that works the estoppel, but the recitals, it seems to us that the doctrine should be applied to the bonds in this case.

When it becomes a question between an innocent purchaser of bonds in the open market and the city purporting to issue them, as to which should be the loser by a breach of duty on the part of the city officers, such question should be solved in favor of the innocent purchasers.***

"This brings us to the second question, which is whether the purchasers in the open market for value and without knowledge or notice of any infirmity in the bonds were required to examine in the city records the contract made with Carstens & Earles and determine whether the bonds were sold so that a greater rate of interest would be paid than that allowed by law. The bonds, as above stated, contain a copy of the act of the Legislature which authorized their issuance, a copy of the ordinance submitting the question to the voters of the city, and a copy of the ordinance providing for the issuance and sale of the bonds. This last ordinance recites that the bonds had been sold to Carstens & Earles, and that a contract for such sale had been entered into. The bonds on their face recite that:

> 'All acts, things, elections, ordinances, resolutions, and conditions precedent to the right to issue and deliver this bond, as

prescribed by said statute and said ordinances, have happened, existed, and been performed prior to the issuance hereof.'

"This is a specific recital that every condition precent to the issuance of the bonds had been performed, and under the rule stated by Judge Dillon was sufficient to work an estoppel, and the purchasers in the open market were not required to look into the records of the city and examine the details of the contract which had been made with Carstens & Earles.

"The statute under which the bonds were issued (section 8008, Remington & Ballinger's Code) authorized the officers of the city upon the conditions there specified to issue and sell bonds. It is further provided that such bonds 'shall be sold in such manner as the corporate authorities shall deem for the best interest of the city.' Here was general authority to the officers of the city to determine whether the conditions precedent necessary to the issuance of the bonds had been performed. * * * *

"The fact that the price at which the bonds had been sold could have been discovered by examining the records of the city council will not prevent a bona fide purchaser from relying upon the doctrine of estoppel.

"In McQuillin on Municipal Corporations, Vol. 5, 2335, it is said:

> 'Recitals in municipal bonds are binding notwithstanding that they are contrary to matters appearing of public record. This is the rule in force at present'."

In First National Bank versus City of North Pleasanton, 257 S. W. (Texas) 609, the City sought to repudiate warrants which recited that they were issued for the purpose of evidencing the indebtedness of the City under and by virtue of the Constitution and laws of the State, and in pursuance of the ordinance passed by the City Council. The warrants were purchased by a bank which had no knowledge of any defect in them, and the bank had an approving opinion from a lawyer as to the validity of the warrants together with certain certificates of the city officials. It seems that in order to enable itself to issue said warrants the City had unlawfully undertaken to include in itself the territory of an adjacent town. It was held that in the face of the representations of the City it was not the duty of the buyer of the warrants to have the City surveyed or to consult the records to see if the property of others had been invaded, but that the doctrine of honesty and good faith, called estoppel, applies to a municipal corporation. The Court cites with approval

the case of Slayton versus Panola County, supra, and says, among other things:

> "It may be added in addition to that declaration that a repudiation of or failure to recognize a just debt not only is disastrous to the repudiator, but weakens or destroys the credit of every municipality in Texas. The principal as to the right of cities to issue warrants for the building of improvements is recognized in a number of Texas decisions. Lasater vs. Lopez, 110 Tex. 179, 217 S. W. 373; Stratton v. Commissioners' Court (Tex. Civ. App.) 137 S. W. 1170; Cowan v. Dupree (Tex. Civ. App.) 139 S. W. 887; Commissioners' Court v. Nichols (Tex. Civ. App.) 142 S. W. 37; Allen v. Abernethy (Tex. Civ. App.) 151 S. W. 348.
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> "North Pleasanton was a de facto corporation at least, and as such can be and should be compelled to meet the obligations voluntarily assumed by it. No valid defense has been presented to the warrants, and honesty, justice, and truth demand the payment of debts contracted by the city. Appellant had the right to act on the presumption that the city was properly incorporated."

In Ind. Dist. vs. R. E. W. 111 Fed. 5, Judge Sanborn lays down the following doctrine:

> "It is not indispensable to the effectiveness

of an estoppel that the acts, works or deeds which work it shall be contained in a negotiable instrument or in any written contract which is the basis of the action. They are as fatal when found in instruments non-negotiable, in writings which are not the basis of the action, when they are mere spoken words, and when they are silent and deceitful acts, as they are when they are contained in a bond or note which is the subject of the action."

In Speer vs. Kearney County, 88 Fed. 749, warrants were issued by the County pursuant to irregular proceedings. The language of the Court is self-explanatory:

"It is conceded that a purchaser of these warrants does not secure the immunity from defenses accorded to the purchaser of commercial paper under the law merchant. He takes them subject to the defenses that the allowances of the debts and the issue of the warrants were not within the scope of the authority of the board, that they were without consideration, and that they were fraudulently created. In short, he takes them subject to all defenses which challenge the merits of the claims. Nevertheless, the warrants themselves are prima facie evidence that the debts are just, and that such defenses do not exist. It was within the power of this board, and it

was its duty to determine the validity of the claims on which these warrants rested, to allow or disallow them, and, if allowed, to issue warrants for their payment. The statute prescribed the time and the manner in which the board should exercise this power and discharge this duty. It did exercise the power and issue the warrants, which were regular on their face, and were apparently prima facie proof of the validity of the debts which they admitted. * * * The plaintiff, a citizen of the State of Illinois, is a holder of the warrants. The presumption is that he found them in the open market, and bought and paid for them in reliance upon the legal presumption, which certainly accompanied them, that the county board had exercised its power at a lawful time and in legal manner. * * * Moreover, in their business transactions, municipal and quasi municipal corporations are governed by the same rule that govern private individuals and corporations. Illinois Trust & Savings Bank v. City of Arkansas City, 40 U. S. App. 257, 277, 294, 22 C. C. A. 171, 182, 193, and 76 Fed. 271, 282, 293. But neither individuals nor corporations can be permitted to deny, to the damage of others, the truth of statements and representations by which they have purposely or carelessly induced such

> others to change their situation. There were lawful times and a legal way in which this board of county commissioners could have allowed these claims, and could have issued the warrants upon them. The warrants were representations of the county that they had been issued, and that the claims which they represented had been allowed at those times and in that manner. The plaintiff had the right to put his faith in these representations, and, now that he has invested his money in reliance upon them, it is too late for the county to deny them to his prejudice. A corporation which, by the regularity of the execution of evidence of its debts, which is apparent upon their face, induces lenders or borrowers to loan money upon or to buy them, is thereby estopped from denying their validity or effect on the ground that, in their execution or in the preliminary proceedings which warranted their execution, its officers failed to comply with some law or rule or action relative to the mere time or manner of their procedure with which they might have complied, but which they carelessly or negligently disregarded."

A case in which somewhat similar defenses were urged is that of Branch vs. City of Sour Lake, Texas, 9 Fed. 2d 971. The Sour Lake Case was thoroughly argued by eminent council for both

parties before the same trial judge who rendered judgment in the case at bar.

The remarks of Judge Estes holding the City estopped to plead the invalidity of the warrants are as follows:

> "(3) I am by no means sure, under the evidence here, that the defenses respecting the validity of the warrants are good. International Harvester Co. v. Searcy County, 136 Ark. 209, 206 S. W. 312; Hitchcock v. Galveston, 96 U. S. 350, 24 L. Ed. 659; City of Tyler vs. Jasper, 97 Tex. 360, 78 S. W. 1058. But regardless of that, if there were in fact irregularities, they are such that the plaintiff can, I think, successfully plead that the defendants are estopped to urge. The warrants were issued for the purpose of offering them for sale to the public, and with knowledge that they would be transferred from time to time. They were issued by a council clothed with authority to issue such instruments. Before they were sold to any one, the requisite tax to liquidate them was provided, and the record attesting their validity was made. There was no fraud or conspiracy, as in the Slayton case (D. C.) 283 F. 330, or lack of authority, as in the Watson Case, 97 F. 450, 38 C. C. A. 264. The proceeds from the sale of the warrants were received by the municipality and applied to

public use, and the plaintiff, the present owner of the warrants, bought them in good faith after reasonable investigation.

"These facts, it seems to me estop the defendants from pleading the irregularities connected with the transaction. The authorities on this point are collated, and the principles that are applied in the decisions are set forth, in the case of Scott County v. Thresher Co., cited above."

The above decision of Judge Estes was affirmed in City of Sour Lake v. Branch, 6 Fed. 2d 355 and Certiorari was denied by the Supreme Court of the United States in the same case, 46 Supt. Ct. 24, 269 U. S. 565.

It will be observed that in nearly all the foregoing cases, the doctrine of estoppel was applied against municipalities which had issued **non-negotiable** notes, warrants or bonds. Therefore, the fact that the warrants in this case are non-negotiable cannot relieve the City of Gainesville from the consequences of the representations it has made. To the same effect see:

Fernald vs. Gilman, 103 Fed. 801;
City Harris Construction Co., 212 Fed. 256;
Morgan vs. Miami County, 2 Black (U. S.) 722;
Mercer County vs. Hackett, 1 Wall 83.

In Hughes County vs. Livingston, 104 Fed. 306, bonds issued by the County contained recitals in substantially the identical language as those contained in the warrants in this case. The defects claimed were sweeping and fundamental, to-wit, that the County never received any consideration for the bonds, that they were issued to take up fictitious warrants issued without compliance with the statutes, that the County never owed a fundable debt under the statutes, that none of the proceedings required to be taken to issue funding bonds were ever taken, **that the proposition submitted to the electors relative to the issuance of the bonds was not in accordance with the terms of the statute,** that the County Commissioners did not advertise the bonds for sale before they issued them and did not register them as required by satute, and evidence was offered to prove each and everyone of the foregoing defects. The Court declined to admit the evidence on the ground that the County was estopped to assert the existence of any of said defects, and this holding of the Trial Court was affirmed by the Circuit Court of Appeals. For lack of space we quote only a comparatively small part of the powerful and decisive language of Judge Sanborn:

> "Recitals are inserted in municipal bonds for the express purpose of inducing buyers to purchase them in reliance upon the truth of

the certificates they contain. Purchasers universally do so. Then the salutary rule steps in, that one who by his acts or representations, or by his silence when he ought to speak out, induces another to change his situation in reliance upon those acts or representations or upon that silence, so that a denial of their plain meaning or effect will injure the latter, is estopped from making such a denial, and that rule forbids the inequitable defense that the recitals in such bonds were not true.**** In the case in hand the laws of South Dakota were such that there might have been a state of facts under which this country would have had the authority to issue these bonds. Under the general laws of that state, this county of Hughes had the power, before the act of 1889 was passed, to erect a court house and a jail, to incur a debt, and to issue warrants for that purpose. If it had done these things, it would have had a lawful debt, which the act of 1889 would have given it ample power to fund. Whether or not it had such a debt when these bonds were issued was a fact peculiarly within the knowledge of its officers, a fact concerning which the purchasers of its bonds would be likely to be densely ignorant. It was therefore exactly one of those facts conditioning the existence and exercise of its power that

under all the decisions it had the right, and that it was its plain purpose, to put at rest by the recitals which the legislature authorized it to insert in its bonds. Those recitals, therefore, were not futile, for the reason that the county had no power to issue the bonds, because there might have been a state of facts under which the power would have existed, and a certificate to the effect that such a state of facts did exist estops the county from denying its existence, and from defeating the bonds on the ground that the certificate was false. ***** That principle is that one may not vest in his agent the power to determine whether or not he has authority in a given case, and silently take the benefit of his decision and his act as agent, and then deny his authority, to the detriment of strangers who have innocently acted in the belief that his power was ample. It is that when a municipal body has lawful authority to issue bonds on the condition that certain facts exist or certain acts have been done, and the law intrusts the power to, and imposes the duty upon, its officers to ascertain, determine, and certify the existence of these facts at the time of issuing the bonds, their certificate will estop the municipality, as against a bona fide holder of the bonds, from proving its falsity

to defeat them. * * *

"In the consideration of these questions, our attention has been called again to the argument that the conclusion which we have now reached opens wide the door for faithful officials to issue unauthorized bonds of their municipality. The argument is that courts should require innocent purchasers to presume that the authorized recitals and certificates of public officials are false; that the debts which they declare are just obligations of their muicipalities are void; and that they should impose upon such purchasers the duty to examine the antecedent records and proceedings of these officers to ascertain whether or not these debts are valid. The argument is suicidal. If it is the duty of an innocent purchaser to presume that the lawful certificate of public officials in the face of bonds is false, and to look to the records and proceedings of those officials to ascertain whether or not it is true, by the same mark it must be equally the duty of such a purchaser to presume that the records and proceedings are also false, and that wherever they disclose no valid debt they falsely disclose that fact, and the truth is that a valid debt exists. If this presumption of falsity is to obtain, the results will be the same, and the debt will be

presumed to be valid because the records show it to be valid. The truth is that this contention is unworthy of serious consideration. The great majority of municipal officers are upright, honest, and watchful of the public welfare. The actions of honest and faithful officals must not be subjected to the suspicions which fit only those who are dishonest and faithless. Contracts cannot be made and enforced, courts cannot administer justice, business cannot be transacted upon any other presumption than that private citizens and public officials alike are innocent of wrong and faithful to their trusts until they are proved to be faithless. In the consideration of the validity of contracts of municipalities, the fact must not be overlooked that municipal officers are not the agents of the purchasers of bonds. They are the agents of the municipalities. They are selected by the creditors of the city or of the county they represent, nor by the courts, but they are chosen by the municipalities themselves. If there is danger that such officers will violate their oaths, and corruptly barter away the rights of the people whom they represent, through the abuse of rules of action which have been established for the guidance of honest men and faithful officials, the remedy is not the punishment

> of innocent creditors who have purchased the negotiable securities of municipalities upon the faith of the acts of their officers, which were generally known to and acquiesced in by their citizens. It is in the election by those citizens of honest men and faithful officials."

The Court in the foregoing case at great length held that the purchaser of the County's obligation is not required to go behind the recitations upon the face of the obligation and examine the records and proceedings of the municipality to see if any defect is there disclosed.

In Board of Commissioners vs. National Life Insurance Company, 90 Fed. 228, 231, 32 C. C. A. 591, 594, the following doctrine is announced:

> "The result is that the recital in the bonds before us that they were issued in accordance with the provisions of the statute imports that they were issued in pursuance of a lawful and proper resolution, and of honest and just action on the part of the Board of County Commissioners under that statute. It relieves the innocent purchaser of all inquiry, notice and knowledge of the actual action and record of the Board, and estops the County from denying that proper action was taken and that a lawful resolution was passed."

The same principle is announced and applied in the following cases:

City of Cairo vs. Zane, 37 U. S. 673;

Nolan County vs. State, 83 Tex. 193;

City of Tyler vs. Tyler Building & Loan Association, 99 Tex. 6.

McQuillin on Municipal Corporations, Vol. 5, Section 2335, states the rule thus:

> "Recitals in municipal bonds are binding, notwithstanding that they are contrary to matters appearing of public record. This is the rule in force at present."

Another elaborate case deserving mention is that of Dietrict vs. Bath County, 292 Fed. 279. The bonds contained recitations in form substantially identical to those contained in the warrants in this case. The defect claimed was that the bonds in part were issued to refund an indebtedness which was invalid because created in violation of the Constitution in that there was not a previous two-thirds vote authorizing its creation. The County was held estopped to assert said alleged invalidity after a very full discussion of the doctrine of estoppel.

Cases strikingly similar to the Panola County case, and in which the doctrine of estoppel was enforced, are:

City of Cadillac vs. Woonsocket Institution, 58 Fed. 935, 7 C. C. A. 574;

Kent vs. Dana, 100 Fed. 56, 40 C. C. A. 281.

We assume more than enough authority has been furnished to establish beyond doubt the application of the doctrine of estoppel to the case at bar. There is no case among those cited in which the representations and recitals were any stronger or more explicit than those in the case at bar. In many of the decisions cited such representations and recitals were decidedly weaker and less explicit. In many of the most important of the above decisions it is emphatically held that the doctrine of estoppel applies without regard to whether the obligation in which the recitals are contained be negotiable or non-negotiable. A number of the cases above cited are warrant cases, including the recent Texas case of Payne vs. Bank of Columbus, supra. Also, in many of the decisions it is distinctly held, among them being included several decision of the United States Supreme Court, that the purchaser has the right to rely upon the truth of the recitals contained in the obligation, and is not charged with knowledge of defects which he might ascertain by inspecting the records and proceedings of the municipality, and that any other rule would greatly impair, if not destroy, the marketability of such obligations and the practical ability of

municipalities to finance needed improvements by the issuance of such obligations.

Finally, we call attention to the fact that in many of the cases above cited the character of defects asserted were very vital and fundamental. In many of such decisions the defects resulted from violating or ignoring constitutional and statutory requirements and conditions precedent. In some of such decisions, it will be remembered, the defect consisted in the failure to hold an election or in the failure to properly hold an election required as a condition precedent to the issuance of the securities. Nevertheless, the just and salutory doctrine is firmly and uniformly applied that if the municipality has the general power under any circumstances to issue its obligation for a given purpose and its authorized officers represent that such circumstances in fact exist and that all necessary proceeding have been had and all conditions precedent complied with, such municipality, after the obligations have passed into the hands of a purchaser for value without knowledge of any infirmities, cannot deny the truth of the representations that have been made, and the purchaser is not charged with knowledge of any defects which might be disclosed by an examination of the records and proceedings of the municipality.

Even if the warrants be regarded as bonds, the recitals and representations in the case at bar, as in many of the cases cited, are broad enough and strong enough to amount to a representation that all conditions precedent, including the holding of an election, if that were necessary, had been fully complied with. Hence it would avail the City nothing in this case, even if the warrants were treated as bonds.

The purpose of the recitals and representations is to lead prospective purchasers to believe them and buy, and nothing could be more disastrous to the credit of cities and counties and their ability to finance public improvements, than the doctrine that a purchaser of municipal obligations cannot safely accord verity to such recitals and representations.

## ALLEGED KNOWLEDGE OF BROWN-CRUMMER INVESTMENT COMPANY

The City, however, urges that Brown-Crummer Investment Company knew of the defects existing in the warrants in this case. This claim is wholly without foundation in the evidence. As already shown, there is not the slightest evidence that any representative of Brown-Crummer Investment Company saw or knew the contents of any of the proceedings of the City Council prior to the ordinance of December 16th, 1919.

The authorities conclusively hold that Brown-Crummer Investment Company was not charged with knowledge of the contents of such prior proceedings, in view of the representations later made. Most of the miscellaneous defects claimed by the City are based upon such prior proceedings, with notice of which we are not charged. There is not the slightest evidence anywhere in the record that anyone informed any representative of Brown-Crummer Investment Company of the existence of any of said alleged defects which the City claims are disclosed by said prior proceedings.

As we recall it, the only defect claimed, which arises out of the events and proceedings subsequent to December 16th, 1919, is the failure of the contractor to finish the job. As to this defect likewise there is no evidence in the record that Brown-Crummer Investment Company, at the time of paying for any of the warrants, was aware that same were not supported by an equivalent amount of work and material. There is not a syllable of evidence suggesting that W. M. Harris, the attorney who was passing upon the validity of the warrants for Brown-Crummer Investment Company, had any such information. Neither is there a syllable of evidence anywhere in the record suggesting that Mr. Crummer, under whose supervision and authority the entire

transaction was being handled, and who was actually paying for the warrants in behalf of Brown-Crummer Investment Company, had any such information. The personal reference to Mr. Crummer appearing on page 27 of the City's brief, is wholly without any basis in the record or in actual truth.

It is true that Mr. Blaine was present in Gainesville at three or four night meetings of the City Council. It so happened the meeting of the City Council were regularly held at night, and Mr. Blaine appears to have brought to three or four of these meetings the forms of proceedings which had been prepared by Judge W. M. Harris. There is no evidence that Blaine was ever present in Gainesville during that period in question save at night at such meetings. There is no evidence that he ever saw or inspected the progress of the job at any of said night visits, or that if he had done so, he could have formed an opinion, or that he was qualified to form any opinion, as to whether the job had progressed to a point justifying any particular estimate. It does appear from the evidence that the job was progressing during the period that the estimates were issued, and that during that period all of it had been done except the laying of brick on certain streets, and the evidence further shows that for a long time much material was on the ground, which was moved away later, when the contractors were

enjoined and left the City. All of the foregoing is undisputed. Furthermore, there is not a syllable of evidence to indicate that anyone ever informed Mr. Blaine that any of the estimates were not supported by an equivalent amount of work and material.

The so-called scintilla of evidence rule prevailing in the State Courts of Texas does not prevail in the Federal Courts. In order to raise an issue of such knowledge on the part of Brown-Crummer Investment Company, the City is required to produce a substantial amount of tangible, definite evidence, having real probative value. All the evidence it has produced is that Blaine was present in three or four Council meetings at night. This, we submit, is altogether too nebulous and unreliable in probative value to meet the rule of the Federal Courts.

Excellent statements of the circumstances justifying the Trial Court to direct a verdict may be found in the following decisions:

Senter vs. W. U. Tel. Co., 16 Fed. (2 Series) p. 120 (Fifth Circuit);

United Central Oil Corporation vs. Helm, 11 Fed. (2d Series) p. 760 (5th Circuit, the Supreme Court denying certiorari, 46 Sup. Ct. Reporter, p. 638);

Hardy, etc., Co. vs. Baker, 10 Fed. (2d Series) p. 277 (6th Circuit);

Schute vs. Hildreth, 8 Fed. (2d Series) p. 128 (8th Circuit);

Barret vs. Virginian Ry. Co., 250 U. S. 473;

Snow Co. vs. Lamborn, 267 U. S. 248.

That is not all, however, Blaine was merely a salaried employee, receiving either $200.00 or $250.00 a month. The undisputed evidence if he had no authority whatever either to make or change any contract for Brown-Crummer Investment Company. He was merely a traveling solicitor. Furthermore, his employment ceased altogether about September 1, 1920, and after that he only acted as a messenger three or four times for Judge W. M. Harris to take to the Council papers which the latter had prepared and to receive some of the adjustment checks representing the second 5% discounts on the warrants, and all this he did after his employment ceased and merely as a courtesy and accomodation on account of his information about the deal. Some of the adjustment checks were made payable to Brown-Crummer Investment Company by the City, but some were made payable to Blaine, in spite of letters received by the City from Brown-Crummer Investment Company, requesting that said checks be made payable to them. Blaine merely endorsed and transmitted these checks to Brown-Crummer Investment Company, as was proper. All of the disputed estimates in this case were

allowed after Blaine's employment ceased, and during that period the contact he had with the matters involved in this case, as above explained, was merely as a courtesy and accommodation.

More important still, however, the undisputed evidence in this case is such that even if Blaine knew that the estimates were not supported by equivalent work and material, the City is estopped and cannot be heard to impute that knowledge to Brown-Crummer Investments Company. The undisputed evidence would still estop the City. It knew that Judge W. M. Harris, of Dallas, Texas, was passing on the validity of the warrants from time to time, and it further knew that Mr. Crummer, at Wichita, Kansas, the executive head of the company, was paying for the warrants from time to time. The City had letters both from Judge Harris and from Mr. Crummer, who were Blaine's superiors, advising it most emphatically and most explicitly that Brown-Crummer Investment Company contemplated and expected to accept and pay for the warrants only as and when the job progressed and estimates were allowed in due course. These letters appear at pages 262-267 of the transcript. A like letter was written for attention of H. W. Head, the man into whose possession the City escrowed said warrants in the first instance. By these letters the

City and Head were each emphatically informed of the conditions and circumstances under which Brown-Crummer Investment Company was willing for the warrants to be escrowed, and under which it understood and expected the delivery of the warrants would be handled, and under which it would would be expected to pay for them. The City, therefore, well knew what Blaine's superiors expected and understood about the matter. There is no pretense that the City informed either Judge Harris or Mr. Crummer that the matter would be handled in any other manner than that outlined in the foregoing letters. There is no pretense that Blaine ever reported either to Judge Harris or Mr. Crummer that the matter be handled in any other manner. Yet, with that knowledge, the City, from time to time, proceeded to pass the various resolutions in evidence, and the City officials signed the affidavits in evidence, and said resolutions and affidavits, as well as the warrants themselves, contained the completest recitals and representations as to the regularity of the proceedings and compliance with all legal requirements and conditions and the amount of work and material that had been done and furnished. The City in its brief says the Mayor and members of the Council did not read what they signed. This statement is utterly without evidence to support it; on the contrary, the undisputed evidence is that the Mayor and mem-

bers of the Council read all the resolutions and papers before signing them, and that they did so on the advice of the City Attorney.

Thus we see that with the most definite and emphatic knowledge of the understanding upon which Blaine's superiors, Judge Harris and Mr. Crummer, were acting, the City, from time to time made the recitals and representations which have been described, and caused Brown-Crummer Investment Company to pay out its money from time to time on the faith of said recitals and representations. There is not a syllable of evidence to suggest that either Judge Harris or Mr. Crummer was not acting in the utmost good faith. The record contains a letter written by Mr. Crummer to Judge Harris, his own lawyer, at page 262 of the transcript. In this letter Mr. Crummer is informing his own counsel confidentially of his desires and understanding as to the manner in which the delivery of the warrants should be handled. This letter is just as clear and free from suspicion as any letter written directly to the City.

In the above conduct, H. W. Head participated. The warrants were first escrowed in his possession. He himself had a letter from Mr. Crummer specifying the conditions upon which Brown-Crummer Investment Company would be willing to pay for the warrants, which letter is just as

clear as any of the letters to the City. The letter to Mr. Head is shown at page 266 of the transcript. Mr. Head therefore, had the same information as the City in regard to Brown-Crummer Investment Company's understanding, and, like the City, he had that information from much higher authority than Mr. Blaine. Nevertheless, he caused his drafts, with the documents which have been described attached thereto, to be forwarded to Brown-Crummer Investment Company, and this course of business as to each estimate was followed by the City and H. W. Head for the purpose of causing Brown-Crummer Investment Company to pay for the warrants. The undisputed evidence is that Brown-Crummer Investment Company in fact relied upon the representations and recitals contained in the warrants and documents when it paid for the warrants, and it may be fairly assumed that Judge Harris necessarily relied upon them in forwarding his approving opinions with the drafts. We submit, therefore, it would be monstrous to now permit either the City or the Head Estate to assert that the recitals and representations in question were really false, and to take advantage of their falsity.

In its brief, the City lays some stress upon the failure of Judge Harris and Mr. Blaine to testify. The City was well aware of Mr. Blaine's

presence during the trial. Blaine was no longer in the employ of Brown-Crummer Investment Company, and had not been in its employ for about five years, and Blaine, therefore, was just as available to the City as a witness as he was to Brown-Crummer Investment Company, and if the City had any reason to believe he possessed the knowledge in question, he should have been called to the stand by the City.

As to Judge Harris, he was subpoenaed as a witness some days before the trial, but did not arrive in Gainesville until after the testimony in the case had been closed.

## ESCROWING THE WARRANTS MADE THEM GOOD

Another matter should be mentioned. It will be recalled that when the warrants were escrowed by the City, and in order to protect itself against any loss should the escrow agent prematurely or improvidently deliver the warrants, the City required and procured from H. W. Head and from Southern Surety Company indemnity agreements and bonds to secure the City against loss if any of the warrants should be finally delivered without its consent. It has been held that the City may properly escrow warrants intended to pay for a job in progress of construction where it

takes a bond to secure itself against loss in the event the job should not be finished.

In Graves vs. M. Griffin & Sons, 189 S. W. 778, the warrants were actually delivered to the contractor in consideration of such a bond, and the transaction was held an treated as a proper transaction.

In the case at bar, the warrants were not even finally delivered to the contractor when the bonds were taken, but were merely escrowed, and the undisputed evidence as to the terms of the escrow is that the warrants were to be finally delivered upon estimates from time to time as the work progressed. Such an arrangement was certainly legitimate, and upon the authority above cited the warrants are valid and enforcible in the hands of Brown-Crummer Investment Company even though it were true that the job was not finished, since the City took indemnity agreements and bonds for its protection, and then undisputedly consented to the delivery of the warrants.

The above decision holds it proper for the City to deliver the warrants outright to the contractor in consideration of receiving such indemnity agreements and bonds, and it can make no difference that in this case the City first escrowed the warrants and later consented to their final delivery.

## REMOVAL OF CASE

It seems to be suggested rather than urged in the City's argument in support of its petition for writ of certiorari, that this case should have been remanded to the State Court. The litigation originally began in the State court and was removed to the Federal court by Brown-Crummer Investment Company. The trial court overruled the City's motion to remand the case. The City took no exception to such action of the trial court, and did not assign same as error. Indeed, after the case reached the Federal court, and after the City's motion to remand had been overruled, the City completely abandoned its former pleadings in the case and substituted entirely new pleadings, and upon this appeal it was stipulated between the parties as follows:

> "All parties having repleaded in this court, with the exception of Southern Construction Company, which did not appear, it is agreed that the transcript of the proceedings in the District Court, as well as all abandoned pleadings, may be omitted by the Clerk in making out the record for the Circuit Court of Appeals as immaterial." (Tr. 120.)

By the foregoing stipulation, the City expressly agreed that the former pleadings upon which the original jurisdiction of the Federal Court depended, were no longer material in the case after

the motion to remand was overruled. In effect, the City thus stipulated that the action of the trial court upon the motion to remand was correct, otherwise the former pleadings could not be immaterial. Furthermore, in the absence of such former pleadings in the record, it must be presumed that the ruling of the trial court was correct.

As a matter of fact the pleadings in this case were thrice abandoned and thrice substituted. The City's original petition was abandoned and substituted by its First Amended Original Petition. That was abandoned and completely substituted by a Second Amended Original Petition, and that in turn was abandoned and completely substituted by the City's Third Amended Original Petition, and the case was actually tried upon the last mentioned petition, which is the only one of plaintiff's petitions actually in the record.

Of course, there can be no doubt of the jurisdiction of the Federal court over the controversy presented in said last mentioned petition between the City of Gainesville, a Texas corporation, and Brown-Crummer Investment Company, a foreign corporation. The cause of action therein asserted by the City against Brown-Crummer Investment Company is in substance that the warrants in question are invalid, and having been acquired by the City with knowledge of such

invalidity, should be cancelled. To that controversy the City, which is the obligor upon such warrants, and Brown-Crummer Investment Company, which is the owner of such warrants, are the only indispensable parties. The cause of action asserted against the Head Estate in said pleading is founded upon an alleged breach of the written indemnity agreements furnished by H. O. Head and Southern Surety Company to the City. We assume no discussion is necessary to show that the controversy presented in such pleading between the City and Brown-Crummer Investment Company, is a separable controversy.

All prior pleadings of the City having been theretofore abandoned and substituted, and such prior pleadings not being set out in the record, it must certainly be presumed that the trial court acted properly in overruling the motion to remand. This legal presumption is further strengthened by the express stipulation of the City that all such prior pleadings are immaterial in this cause.

The record is wholly silent as to the contents of the City's original petition, and of the City's second amended original petition. It is also silent as to the contents of the first amended original petition, except for the following stipulation partially stating its contents, to-wit:

"And thereafter, on December 10, 1923, the

> plaintiff filed its First Amended Original Petition making Brown-Crummer Investment Company a defendant, and alleging that the warrants constituted valid, legal and binding promises and obligations of the plaintiff, and the plaintiff further pleaded, in the alternative, that if it be true that said warrants were not valid, which the plaintiff denied, and the Court should hold that such warrants are void, then the plaintiff in said pleading prayed that the warrants be cancelled and declared void." (Tr. 121.)

The record does not state whether there was any other party defendant to said First Amended Original Petition, and it does not set forth any of the remaining contents of said pleading. If the Head Estate was a party thereto, the record is silent as to the allegations against the Head estate. The record does not disclose upon which of the successive petitions above mentioned the case was removed to the Federal court. If it was removed upon the Original Petition, or upon the Second Amended Original Petition, the record is wholly silent as to the contents of such pleadings. If it was removed upon the First Amended Original Petition, the record is silent as to its contents except to the extent above stated. In any event, every presumption in favor of the trial court's ruling must be indulged.

Let us assume for the sake of argument, as is apparently assumed in the City's brief herein, that the City's pleading at the time of the removal of the case, set forth two causes of action:

(a) A cause of action against the Head estate for alleged breach of the written indemnity agreements given by the Head estate and Southern Surety Company to the City to protect the City against the delivery of the escrowed warrants before notification by the Mayor that they might be delivered and before the work done by the Construction Company equaled the required amount.

(b) A cause of action against Brown-Crummer Investment Company alleging:

> "That the warrants constituted valid, legal and binding promises and obligations of the plaintiff, and, in the alternative, that if it be true that said warrants were not valid, which the plaintiff denied, and the Court should hold that the warrants are void, then that the warrants be cancelled and declared void."

Upon such a state of pleading clearly the second cause of action presents a separable controversy between the parties thereto, if it presents any cause of action at all. Whether the allegations constitute a good or bad cause of action has nothing to do with whether the contro-

versy is separable. If the controversy is separable, Brown-Crummer Investment Company, is entitled to have the Federal Court determine whether the cause of action is good or bad.

To be sure, the Head estate asserts that the City has suffered no damages on account of the breach of said indemnity agreements because the outstanding warrants are invalid anyhow. The validity of the warrants, therefore, is a **question** arising in the course of the controversy between the City and the Head estate. Such question, however, is not determinative of the controversy between them, because there may be other reasons which would preclude the City from recovering from the Head estate. For instance, the Head estate contends, and the Trial court so held, that the conditions of said indemnity agreements had been actually complied with by H. O. Head.

Likewise, the validity of the warrants is a question arising in the course of the controversy between the City and Brown-Crummer Investment Company. Such question, however, is not determinative of that controversy either. As heretofore shown in this brief, even if the warrants were invalid, they would not be subject to cancellation in the hands of Brown-Crummer Investment Company on account of the doctrine of estoppel. The point is that the existence of a common question in the two controversies, if a

common **question** may be said to exist, does not prevent one of the controversies from being a separable controversy between the parties thereto. It may be **convenient** to join the controversies in a single suit on account of the existence of a common question among other questions, and it may even be proper to do so, but if there be no joint liability, and if one of the controversies can be wholly determined between the parties thereto without the presence of any other party in the case being indispensable, then such controversy is a separable controversy.

English vs. Supreme Conclave, 235 Fed. 630;
Bates vs. Carpentier, 98 Fed. 452;
Barney vs. Latham, 26 L. Ed. 514, 103 U. S. 206.

So, in the state of pleadings above supposed, the controversy between the City and Brown-Crummer Investment Company is clearly separable. The controversy is whether the warrants should be cancelled. The City is the only obligor on the warrants; Brown-Crummer Investment Company is the only owner of said warrants. Necessarily, they are the only indispensable parties to the determination of the controversy whether the warrants should be cancelled. It might be convenient for the City to litigate the question of the validity of the warrants, in one case combining both controversies,—but it is by

no means necessary to do so. There was nothing to prevent the City from filing an independent suit against Brown-Crummer Investment Company, asserting the invalidity of the warrants and asking for their cancellation, and in such suit it would have been wholly unnecessary to join any other party,—certainly unnecessary to join the Head estate.

No character of joint obligation or joint liability is asserted by the City against Brown-Crummer Investment Company and the Head estate. On the contrary, the cause of action asserted against Brown-Crummer Investment Company in the supposed state of pleading, is a wholly alternative cause of action. The alternative character of same further emphasizes its separability. See:

Strother vs. Union Pacific Ry Co., 220 Fed. 731;
Bedell vs. Baltimore Ohio Ry. Co., 245 Fed 795.

Respectfully submitted,

James G. Martin
Edward R. Martin
Rhodes B. Baker
Alex A. Weisberg
Thompson, Knight, Baker & Harris

Counsel for Brown-Crummer
Investment Company

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IN THE

# Supreme Court of the United States

No. 433

CITY OF GAINESVILLE,
Petitioner,

vs.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY AND H. O. HEAD, EXECUTOR OF H. W. HEAD,
Respondents.

## Brief of Brown-Crummer Investment Company Replying to Brief for Petitioner and to Brief for H. O. Head, Executor.

Briefs have been filed recently in this cause by counsel for H. O. Head, Executor and by counsel for petitioner. The able brief filed by the Executor's counsel is largely based on adroit but erroneous interpretations of our contentions. The petitioner's brief, like its application for writ of

certiorari herein, is replete with over-heated and unfounded statements and generalizations both of fact and law. Accordingly we take the liberty to submit the following observations by way of replication to said briefs.

**The Instruments are Warrants**

As shown in our original brief, it has been definitely settled by a long line of authorities in Texas that instruments substantially identical in form to those involved here are warrants and not bonds, even though their form possesses certain characteristics of bonds. In spite of the doubt which adverse counsel profess, it is nevertheless a fact that warrants in form substantially identical to those involved here have been issued for many years in great quantities, by cities in Texas, both large and small, as well as by counties in Texas, both large and small, and there are now outstanding in the hands of innocent investors throughout the country many millions of dollars worth of such securities, including the warrants in this case, which have been bought and paid for on the faith of such decisions recognizing such instruments to be warrants instead of bonds. In the culminating decisions of Lassater vs. Lopoz, 202 S. W. 1039, 217 S. W. 377; Branch vs. Sour Lake, 6 Fed. (2nd) 655, 9 Fed. (2nd) 971; Payne vs. First National Bank of Columbus, 291 S. W.

209, and in Graves vs. O'Neal & Sons, 189 S. W. 778, the exact contention was made that is made here, to-wit, that such warrants were issued as a device to circumvent the law of Texas relating to the issuance of bonds, and in each instance the court, after mature consideration, held the instruments to be warrants.

These decisions we submit are entirely sound. If John Smith signs a promissory note in the ordinary negotiable form and delivers it to Bill Jones, such note is a negotiable instrument. If, however, before signing and delivering such note John Smith writes across the face thereof "This is a non-negotiable note" his intention is respected by the courts, and the instrument though otherwise negotiable in form, is treated as a non-negotiable instrument. The same principle applies here. The City's intention is perfectly manifest. In the original contract between and City and the Contractor, it is stipulated that the Conractor shall be paid by city warrants. In the contract of June 18th, 1920, between the City and Brown-Crummer Investment Company, it is again stipulated that the instruments are to be warrants (Tr. 206-207). In everyone of the several ordinances and resolutions passed by the City of Gainesville from time to time, it is repeatedly stipulated that the instruments to be issued shall be warrants. **In the form of the instrument itself and on the face and in the body thereof, it is**

**no less than six times denominated and characterized to be a warrant** (Tr. 245-247). The word "warrant" as applied to a municipal obligation, has long had a recognized significance in the law. It is well understood to be a non-negotiable obligation. The City's intention in this case to issue warrants could not be more clear; and there is nothing whatever in the record to suggest that such intention was not a bona fide intention. In support of the judgment of the trial court and of the Circuit Court of Appeals, it must be presumed that each of said courts believed and found such intention to be a bona fide intention. Certainly there is no reason in common sense or legal principle why such bona fide intention should not be respected.

Furthermore, if it be true that the City of Gainesville had no right to issue bonds under the facts of this case, then certainly it should not be presumed in the teeth of the repeated declarations by the City of its intention to issue warrants that it intended in fact to do something else which it had no right to do. On the contrary, even if the instruments issued may be construed as either bonds or warrants, then in the absence of clear evidence disclosing an unlawful intention, it must be presumed in favor of the official acts of the City's responsible officials that they intended to do what they had a lawful right to do

and that the instruments issued in this case were intended to be and are warrants.

### City's Power to Issue Warrants

It is not our contention, as implied by learned counsel, that the City of Gainesville may do anything and everything not forbidden by its charter. On the contrary, we rely as we shall show, upon the same doctrine stated in the case so much relied upon by them, to-wit, Foster vs. City of Waco, 113 Texas, 352, that a municipality possesses those powers which may be "necessarily or fairly implied in or incident to the powers expressly granted." Neither is it our contention that the City of Gainesville has authority to issue warrants to an **unlimited** amount. Neither is it our contention that we rely exclusively on Section 3, Article 2 of the Gainesville charter, nor that we rely exclusively on Section 1, Article 4 of said charter, nor that we rely exclusively on both of said sections together. On the contrary, we rely upon the whole charter, including the above sections and others to be mentioned, which taken together and rationally construed in the light of settled authority incontestably establishes the power of the City of Gainesville to issue the non-negotiable time warrants which were issued in this case.

It will aid in dispelling confusion to bear in

mind certain fundamental distinctions which existed in our municipal jurisprudence long before the present Gainesville charter was granted in 1909, and which have continued to exist in our municipal jurisprudence since that time.

(a) Wherever a municipality is authorized by the law of its creation, whether general statute or special charter, to make a given public improvement, such municipality has the implied power to pay for such improvement as it is thus authorized to make by the issuance of its non-negotiable obligations, such as warrants. That is the actual situation in the case at bar. There will not be implied however, from the power to make the improvement, any power to pay for same by the issuance of negotiable obligations, such as bonds. The existence and reasons for these rules and distinctions are well stated by this Honorable Court in Claiborne County vs. Brooks, 28 L. ed. 470 and in Policy Jury vs. Britton, 21 L. ed. 251. The learned counsel, however, are constantly confusing the above mentioned powers.

(b) Entirely distinct from the power of the municipality to pay for a public improvement by the issuance of its obligations is the power to **borrow money** for the purpose of building improvements. These two powers have long been recognized by the courts as being entirely differ-

ent and distinct. The first of them is implied from the power to make the improvement; the second of them however, is not ordinarily implied from the power to make the improvements. The above distinctions and the reasons for them may be found mentioned in Allen vs. LaFayette, 8 So. 30, Ashby vs. James, 226 S. W. 737 and Payne vs. Bank of Columbus, 291 S. W. 209. Yet, the learned counsel are also constantly confusing the above mentioned powers.

Thus it appears that neither the power to issue **negotiable** obligations, nor the power to **borrow money** may be implied from the power to make the improvements **but that the power to pay for the improvements by the issuance of non-negotiable obligations is implied by the courts from the power to make the improvements.** We call attention to these long settled rules of construction, because they must be carried in mind in the consideration of the authorities, and because they at once make clear the purpose, function, and effect of the several provisions of the Gainesville charter which we shall have occasion to discuss.

First, it should not be forgotten **what power** has been actually exercised in this case. As we have shown, it is not the power to issue negotiable bonds. Neither is it the power to borrow money. Yet the learned counsel are constantly assuming that these are the powers which have

been actually exercised in this case. There is no justification for such confusion. The contract between the City and the Contractor stipulates that the contractor shall receive its pay in the form of warrants to be issued and delivered to him by the City (Tr. 139-140). This contract was confirmed by ordinance (Tr. 165, 46-63). By successive resolutions from time to time, the City authorized the actual delivery of certain warrants in certain amounts to the contractor upon estimates duly audited, found to be correct and approved (Tr. 251-260, 167-173). Although as shown in our original brief, certain of the warrants were escrowed in advance, none of them were actually released from escrow for final delivery until the passage of such resolutions from time to time (Tr. 258-267, 191-193). There is not a syllable of evidence in the record from which it may be remotely inferred that the City used any of the warrants for the purpose of borrowing money with which to pave its streets. There is not a syllable of evidence in the record to suggest that the City procured the proceeds resulting from the sale of any of said warrants and then spent such proceeds to pave its streets. No part of the proceeds of the warrants ever came into the hands of the City. The undisputed evidence is that the warrants themselves were delivered to the contractor or upon the contractor's order to its nominee or assignee, and that the money paid for said war-

rants by Brown-Crummer Investment Company was paid to the contractor or to the contractor's assignee, H. O. Head. The paving was done directly by the contractor and not by the City. The actual power therefore, which the City has undertaken to exercise in this case, is the power to pay for its share of the cost of street pavement by the issuance of its non-negotiable warrants to the contractor, and not the power to borrow money for the purpose of paving its streets, or the power to issue negotiable bonds.

And so bearing in mind the power actually exercised here, we come now to the charter itself to ascertain whether such power exists.

**Sec. 3, Art. II:** The learned amicus curiae seek to depreciate the significance of Sec. 3 of Article 2 of the charter which reads as follows:

> "The City of Gainesville shall have power to enact and enforce all ordinances necessary to protect health, life and property, and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the city and its inhabitants, to protect lives, health and property of the inhabitants of said city, and to enact and enforce any and all ordinances upon any subject; provided, that no ordinance shall be enacted inconsistent with the laws of the State of Texas, or inconsistent

with the provisions of this act; and provided further, that the specifications of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this act to grant to and bestow upon the inhabitants of the City of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter or by some general law of the State of Texas, or by the provisions of the Constitution of the State of Texas."

The charter is an act of the legislature. This article is one of its opening provisions, and obviously lays down a rule of construction by which the whole act is to be construed. It furnishes a guide which must be followed in the interpretation of every grant of power therein contained, and is not confined merely to the powers mentioned in the article itself. It furnishes a legislative rule of construction plainly intended to apply to every power granted in the entire Act, the last explanatory clause of the article being as follows:

"***It being intended **by this act** to grant to and bestow upon the City of Gainesville **full** power of self-government, and it shall have and exercise all powers of municipal government **not prohibited to it by this charter,"** etc.

Clearly, the Legislature is attempting to furnish a guide for the interpretation and construction of the entire Act. Now, we do not assert, as suggested by the learned counsel, that the effect of this article would be to confer upon the City the power to do anything and everything not expressly forbidden by the charter. But we do assert that by this section the Legislature has commanded that every grant of power that is contained anywhere in the charter should not be construed as a limitation upon other powers in the charter, but should be construed in a liberal spirit, and that from every grant of power actually contained anywhere in the charter should be implied such incidental powers, not expressly forbidden, as are fairly appropriate to its exercise. Certainly no one can justly deny to this section the forces and significance above indicated.

The section, however, does more than merely lay down a rule of construction. It also contains some very important grants of power in itself, the last clause therein being as follows:

> "And it shall have and exercise all powers of municipal government not prohibited to it by its charter or by some general law of the State of Texas or by the provisions of the Constitution of the State of Texas."

We submit that this language in connection with the preceding language of the section is

plainly intended by the Legislature to confer upon the City of Gainesville all powers of municipal government conferred by the general laws of the State of Texas on cities. It will be borne in mind that many cities in Texas are organized and act merely under general laws; others are organized and act under special charters The above section clearly bestows on the City of Gainesville all municipal powers authorized by the general laws of the State. **In other words, the general laws of the State of Texas conferring powers on cities are in effect by this section adopted by reference and made a part of the special charter of the city.** Now, as we shall see from the authorities shortly, cities in Texas deriving their powers from the general laws of the State have abundant power to do exactly what the City of Gainesville has done in this case, that is, to issue non-negotiable time warrants to pay for the making of authorized public improvements. Thus, the section under discussion not only commands that the powers contained in the special charter shall be liberally construed, but also confers upon the city all municipal powers given to cities by the general laws of the State, which includes the power to do what was done in this case.

**Section 5, Art. II.** In Article II, Section 1, is conferred the general power to contract. In Article III, Section 1, is conferred the general power to levy taxes. And then in Article II, Section 5,

we find the following vital and fundamental powers:

> "The City of Gainesville shall have and exercise exclusive power and control over the streets, avenues, alleys, etc., **** within the city; and the council shall have power to open, abolish, widen, extend, establish, regulate, grade, pave, macademize, drain, clean or otherwise improve said streets, avenues, alleys, highways, etc."

Here is a clear, comprehensive and unqualified power to pave streets. From this section, as we shall show, must be implied the power to pay for the pavement of streets by the issuance of non-negotiable warrants. Yet the learned counsel make no reference to this important section anywhere in their argument.

In City of Galveston vs. Loonie, 54 T. 517, the plaintiff's right to a recovery depended on the power of the city of Galveston to construct sidewalks and give its valid, written, non-negotiable obligation to pay therefor at a future day. The charter empowered the City of Galveston to "construct sidewalks." The court held that the power to execute written obligations to pay for the construction of said sidewalks, specifying in what installments and at what times the indebtedness was to be paid, must be implied from the power to construct sidewalks, saying:

> "Speaking of municipal corporations, Dillon, in his work on that subject says: 'To the extent necessary to execute the special powers and functions with which it is endowed by its charter, there is an implied or incidental authority to contract obligations.' 1 Dillon, Sections 371-372***** We are of the opinion that the City of Galveston, under the charter, had power to incur indebtedness in constructing sidewalks and in making sanitary improvements, and to execute written contracts specifying in what installments and at what times that indebtedness was to be paid."

The same doctrine was approved in City of Galveston vs. Heard, 54 Tex. 420.

Thus was established in Texas, long before the Gainesville charter was granted in 1909, the familiar rule of charter construction, that where a municipality is empowered to make a particular improvement, it has the implied power to pay for same by the issuance of non-negotiable obligations.

The learned counsel admit that such might be the rule as to powers conferred upon counties, but intimate the rule may or should be different as to cities. It will be observed, however, that this doctrine was first applied in Texas to cities. And since that time the doctrine has been applied

by our courts, uniformly, both to cities and counties.

In Hoffman vs. County Commissioners, 41 P. 566, the court said, with respect to county warrants:

> "It is established doctrine that a municipality has the implied power to incur indebtedness whenever it is necessary to do so to carry out any power conferred upon it unless the contracting of such debt is prohibited by statute."

In Graves vs. O'Neill & Sons, 189 S. W. 778, the city issued warrants to pay for certain water works improvements. The Court said:

> "But the City of Tioga was authorized to make contracts for the improvement of its streets and water works and could determine that such improvements should be paid for otherwise than by the sale of bonds. If, therefore, said city determined that the improvements involved in this suit should be paid for by warrants of the city, and such warrants, and not bonds, were issued for that purpose, the statute forbidding the issuance of bonds unless authorized by a majority of the taxpaying voters of the city, has no application."

In Lasater vs. Lopez, 202 S. W. 1039, 110 T. 179, very full and well considered opinions were de-

livered both by our Court of Civil Appeals and by our Supreme Court. In the opinion of the Court of Civil Appeals will be found a historical discussion of the implied power of the county to issue its non-negotiable time warrants to pay for roads and bridges, which it is authorized to build, and it will be noticed that such implied power is now based upon a statute which merely authorizes the county court to provide roads and bridges and to audit and settle the county's accounts. The Court of Civil Appeals said:

> "The cases discussed have been followed by many others and it is well established that the Commissioners Court has the power to incur indebtedness, not only to the extent of the revenues of the county during the terms of office of such commissioners, but also to the extent of contracting away revenues which will be collected during many years, and to evidence the indebtedness by interest-bearing warrants." (Citing authorities).

The Court then proceeded to further hold that other provisions of law conferring upon the county the power to issue bonds, after vote of the people authorizing same, does not limit or abrogate the above implied power to issue warrants. The Court further said:

> "Had there been statutes forbidding the commissioners' court to issue warrants except

to the extent of the current revenues for the year, the court would perhaps have held in the Breedlove case that the power to issue bonds was necessarily implied from the provision directing the erection of courthouses. In appellants' brief the doctrine that the commissioners' court can accomplish by means of warrants what the voters have refused to permit them to accomplish by means of a bond issue is assailed in a very forceful manner. The only answer we can make is that it is a matter which should address itself to the Legislature. It may be that debts which will exhaust the revenues for years to come should only be created by bond issues, but the Legislature has not seen fit to say so, and it has had many opportunities to do so, since it has been authoritatively established that the laws did not so provide."

In the Supreme Court opinion on the same case of Lasater vs. Lopez, supra, the court first pointed out that the county had no implied power to issue negotiable securities to pay for the construction of roads and bridges. But, with reference to the implied power to issue non-negotiable warrants to pay for same, the court said:

"At the time of the passage of the Act on April 28, 1903, granting authority for their use for county road purposes, Commissioners Courts had the undoubted power, within the limits of

lawful taxation and by observance of the constitutional requirement relative to the creation of county indebtedness, to provide for the building of such roads by the issuance of interest bearing county warrants. They had possessed it since the orginal Act of 1876 providing for their organization. This authority, where it was necessary for the county to use its credit for the purpose, was but a part of the power reposed in those courts to lay out and establish the roads, and proceeded, as well, from their duty to establish them by constructing them as durably as possible within the county's resources or limits of taxation. It was a means for executing the general power expressly granted, a lawful means because appropriate to that end."

The Court then proceeds to hold that the later act of the Legislature granting authority to counties to issue negotiable county bonds for road and bridge purposes did not have the effect of abrogating the pre-existing power to pay for same by the issuance of non-negotiable warrants, and said:

"The power originally possessed was that of issuing for the purpose non-negotiable instruments. The power conferred by the later act was that of issuing for the purpose negotiable securities, and contemplating, neces-

sarily, road improvements upon a larger scale than had been or would be possible through the issuance of warrants. The two powers relate to making use of a county's credit in distinctly different ways and evidencing its debt by instruments of clearly different nature, different in their legal import and different in their legal effect upon the rights of the county under them. There could be no positive opposition in the lawful exercise of both powers."

In Bridges vs. City of Lampasas, 249 S. W. 1083, was involved the power of a city, incorporated under the general laws of the State, to issue non-negotiable warrants in payment for permanent street improvements without a vote of the people. This power was implied from the legislative delegation to cities of the power to control, create and otherwise improve streets. The language of the court dealing with the powers of cities in Texas is clear and decisive:

"Second. It is generally conceded and well established, that municipal corporations are invested by implication with the power to contract on the general credit of the city with respect to such improvements as they are authorized to make (citing numerous authorities."

"Third. It is well settled in Texas that

counties have power to contract for the construction of courthouses, or for the improvement of public roads, on the general credit of the county, and to issue in evidence of the indebtedness thereby created the interest-bearing warrants of the county, maturing in after years." (Citing numerous authorities).

"Fourth. Cities incorporated under the general laws have authority to issue interest-bearing warrants in evidence of indebtedness lawfully created." (Citing numerous authorities).

"Eighth. The authority granted by the third section of the Acts of the Thirty-seventh Legislature (Chapter 9) to any city providing for improvements to issue coupon bonds therefor in such manner as may be deemed expedient, is a mere expression of the intention of the Legislature that such cities and towns shall have authority, if they elect to do so, to issue bonds under the general law, based upon the increased taxing power provided by this statute, and will not be construed as a limitation on the existing power of such corporations to contract for public improvements on the general credit of the city, and issued in evidence of the indebtedness thus created the interest bearing non-negotiable warrants of the city, for the reason that the existence of this

> power to contract must have been known to the Legislature at the time the act in question was passed; and there is no language contained in the act which in any manner undertakes to limit or restrict the then existing powers of municipal corporations with respect to authorized public improvements."

An examination of the foregoing decision will disclose, as heretofore stated, that under the general laws of the State cities have the power to pay for pavement by either of two methods, to-wit, the issuance of non-negotiable warrants without vote of the people, or the issuance of negotiable bonds by vote of the people. Both of these powers were put into the general laws of our State relating to cities at the same time, and it will be noticed that the Court emphatically holds that the power to issue bonds by vote of the people does not limit or restrict the power to issue warrants without a vote of the people and that both methods of financing are available to cities under the general laws of the State. Finally, referring to the case of Lasater s. Lopez, supra, where the power of counties was involved, the court concludes with the following important declaration:

> "All the reasons given in that case for sustaining the power of counties to pursue the course referred to apply with equal force to cities and towns incorporated under the stat-

> ute; and therefore we agree with the Fifth Court of Civil Appeals, which held in Graves vs. M. Griffin, O'Neill & Sons, 189 S. W. 778, that such municipalities possess such power."

To the same effect, with respect to the powers of cities, see First National Bank vs. City of North Pleasanton, 257 S. W. 609.

Another very recent case is Payne vs. First National Bank, 291 S. W. 209. In that case the power of a city in Texas to issue warrants to pay for building a bridge was involved. It was contended that the real purpose of the issuance of warrants was not to pay for the bridge but to **borrow money** for the purpose of using the proceeds to build a bridge. The Court recognized the difference between the power to pay for a bridge by warrants and the power to borrow money for the purpose of building a bridge, through the issuance of warrants, and it held such difference to be immaterial in the particular case because the city, in any event, was estopped to deny the validity of its obligations. The Court held:

> "The city, by virtue of articles 854 and 857 of the Revised Civil Statutes of 1911, was expressly authorized to contruct bridges and improve streets. The authority given by these statutes includes an implied authority to make such improvements on credit and to

> issue interest-bearing warrants for the deferred payments of the price,"

citing with approval the cases of Lasater vs. Lopez, supra, and Bridges vs. Lampasas, supra.

In the recent case of Ashby vs. James, 226 S. W. 737, which the learned counsel confuse as an authority in their favor, it was held merely that counties did not have the power to **borrow money** by the issuance of warrants for the purpose of building courthouses. The distinction between **that** power and the power to pay for a courthouse by the issuance of warrants is stated by the Court as follows:

> "We think the trial court would have been justified in finding by this method the commissioners sought to borrow money on the issuance of warrants. This, as we understand, the court had no authority to do, except by issuing bonds. It probably had the power, if the court desired to erect a courthouse without entering into an agreement with a contractor, as it purchased the material, to issue warrants therefor, or warrants to pay for the necessary labor as the services are performed."

The above authority, therefore, merely emphasizes the distinctions we are trying to make here.

As shown in our original brief, the case of Foster vs. Waco, supra, is altogether immaterial.

The learned counsel contend in substance that the effect of such case is to hold Lasater vs. Lopez, supra, inapplicable to cities, and to deny to the City of Gainesville the power which it exercised in this case. This contention does not even possess a specious plausibility. Indeed, the rule of implied powers for which we contend here is reaffirmed in said case as follows:

> "However, the insistence is here made, and the majority opinion of the Court of Civil Appeals hold, that the power to create the debt and execute the notes in question is necessarily implied as resulting from the power expressly conferred to establish cemeteries. This is based upon the familiar rule that wherever a power is given by statute, everything necessary to the making effectual or requisite to attain the end is implied. Kent's Commentaries (13th ed.), Vol. 1, p. 551 (464). We recognize the rule, but it has no application here."

Thus, the rule for which we contend is expressly recognized by the Court in said case, but the Court points out that such rule has no application to that particular case. And it certainly has no application to that particular case. The explicit language existing in that particular charter affirmatively precludes any implied power to issue the obligations in question under the circumstan-

ces existing in that case. The phraseology in the Waco charter explicitly and affirmatively denies the power which the City of Waco undertook to exercise in that case. In other words, the power there sought to be implied was forbidden by the particular language of the Waco charter, which expressly states that if such power should be exercised under the circumstances existing in said case, same should be null and void and of no force and effect. Surely no power that is expressly forbidden can be implied, and that is all there is to the case of Foster vs. Waco.

It should hardly be necessary to point out that Crossman vs. Galveston, 112 Texas, 303, and Pye vs. Peterson, 45 Tex. 312, are altogether immaterial. As stated in the first of said two cases, if the ordinance in question had been enacted under express legislative sanction, it should be void for unconstitutionality. Of course, a power that is unconstitutional will not be implied.

It follows from the foregoing authorities that since the City of Gainesville had the express power to pave its streets, it had the incidentally implied power to pay for same by the issuance of non-negotiable time warrants, **and, therefore, Section 5 of Article II above quoted, of the Gainesville charter, alone is indubitably sufficient to authorize the warrants in this case.**

**Article IV, Section 1.** Certainly Section 1 of

Article IV of the Gainesville charter cannot and does not limit or derogate from the above mentioned clearly existing implied power. On the contrary, it relates to a distinct and different power, to-wit: the power to **borrow money** for various public improvements. It deals only with the power to borrow money for such purposes.

Even in the exercise of that power, we submit, the city is not limited to the issuance of bonds. It is not to be lightly presumed that the Legislature intended to confine the city to that one method of borrowing money, regardless of the amount borrowed or the purpose for which it is borrowed. Under the liberal rules of construction which must be applied to this charter, the word "may" must be given its usual and ordinary significance. And if there be any other method reasonably appropriate to the borrowing of money for such purposes, it clearly was not the intention of the legislature to deny to the City of Gainesville the use of such other methods. There is nothing in the section to indicate that the word "may" is not intended to mean may. This is true because in the same section the Legislature does not hesitate to use the word "shall", or other mandatory language, wherever it desires. Furthermore, at the outset of the charter, the Legislature has said that the specification of any particular power anywhere in said charter shall never

be construed as a limitation upon other powers therein conferred.

In any event, the section under discussion deals only with the borrowing of money, and therefore has nothing to do with what powers will be implied from the independent grant of an altogether different power, to-wit: the power to make public improvements, such as paving streets. Therefore, the section cannot, under any rule of construction, be treated as a limitation upon an altogether independent section, conferring an altogether independent power.

The learned counsel appear to assume that the power to make street improvements is derived from said Section 1 of Article IV. If this were true, much of the language of Section 5, Article II would be wholly useless and without function. The completest power to make street improvements had already been conferred in Section 5 of Article II, and from that power, as already shown, would be clearly implied the power to pay for same by non-negotiable time warrants. The purpose and function of the later Section 1 of Article IV is to supply those powers which are not to be implied from the powers already conferred in the preceding sections of the charter. In other words, the purpose of Section 1 of Article IV is to confer on the City the additional powers, not yet conferred, to borrow money for

public improvements and to issue negotiable bonds to repay such borrowed money. This construction gives to every section of the charter which has been discussed, a natural and logical function, and is in harmony with long accepted rules of charter construction. The construction urged by counsel, on the other hand, ignores these familiar rules of charter construction, violates the liberal rule of construction commanded by the Legislaure at the outset of the charter, disregards much of the actual phraseology in the sections under discussion and leaves much of said phraseology without any purpose, function or effect.

If the learned counsel were correct in their narrow and restricted interpretation, the result would be that every time the City of Gainesville desired to make or contract for the making of any kind of public improvement mentioned in Sec. 3 of Art. 2, exceeding $2500.00 in amount, or any time it desired to borrow money for any of said purposes in a sum exceeding $2500.00, it could do so only by issuing negotiable bonds, after a vote of the people authorizing same. It is not to be lightly presumed that the Legislature intended to put the City of Gainesville into such a strait-jacket. On the contrary, the charter is not rationally susceptible of such an extra-ordinary construction, and at the very outset of the charter the Legislature itself by the strongest language it could command, has declared that this

particular charter shall not be construed in any such spirit or manner.

It should be manifest, therefore, that the issuance of the warrants in this case was not an "experiment" or a "subterfuge" but was the exercise of a long established and legitimate power. In spite of the doubt which the learned counsel profess, it is nevertheless a fact that warrants in form substantially identical to those involved here have been issued by cities having charters substantially identical to the one involved here for long years in Texas, and in amounts aggregating many millions of dollars, and that there are now outstanding, in the hands of innocent investors throughout the country, many millions of dollars worth of such securities which have been bought and paid for on the faith of what has been long regarded and accepted as the settled and decided law of the State. It is, as we understand it, the well established rule of the Federal Court that municipal securities issued and bought on the faith of pre-existing decisions of the particular State holding such securities to be valid and enforceable, cannot be invalidated by a reversal of such decisions. The case of Keel vs. Pulte, 297 S. W. 241, is merely a decision, thus far, of one of our intermediate court, to-wit, the Fort Worth Court of Civil Appeals, and is now pending before the Supreme Court of our state. As explained in our original brief, there is every reason to

assume that the decision oft he Fort Worth Court of Civil Appeals will be reversed by the Supreme Court of Texas. It will have to be reversed, unless the Supreme Court of Texas is prepared to reverse the long line of decisions contained in this and our original brief, clearly establishing the validity of the warrants in question. Should the Supreme Court of Texas take such unforeseen course, which we do not anticipate, we submit that the Supreme Court of the United States should protect warrants issued before such reversal and bought on the faith of prior authority.

It is suggested that the continued exercise of the power to issue warrants would lead to the abuse thereof by the issuance of unlimited quantities of such securities and by the unwise issuance of such securities. As a matter of fact, the power is not unlimited. There are at least two fundamental limitations. First, warrants can be issued only for a lawful purpose, such as a public improvement which the municipality is actually authorized to make. Second, there are familiar constiutional and statutory limitations on the taxing power of the municipality and its debt-making power, and the issuance of warrants is necessarily confined within such boundaries. The argument of the learned counsel, however, is one which should be properly addressed to the Legislature. Indeed it is an argument that has been frequently addressed to the Legislature. It is, for instance,

a matter of common knowledge in Texas that such argument was vigorously urged upon the last Legislature. Yet the Legislature has never seen fit to put any limitations upon the power of municipalities to issue warrants, although such power, as shown, has been exercised in Texas for many long years. It occurs to us that if the settled law of the State is to be changed because of anyone's opinion as to its wisdom, such change should be made by the Legislature, and it should not be so made as to injure those who have heretofore invested in securities which they had every reason to believe were valid, on the faith of the decisions of our courts.

As a matter of fact, we would further venture the thought that it may be justly doubted whether there has been in the past, or is likely to be in the future, any more abuse or folly in the issuance of warrants by public officials than in the issuance of bonds by vote of the people. It is certainly open to argument whether public officials or voters are likely to use better judgment in such matters. If any event, the Legislature and our courts have heretofore seen fit to permit municipalities to issue non-negotiable time warrants for lawful purposes without a vote of the people and to permit them to issue negotiable bonds for such purposes by a vote of the people. The difference between the two powers has been long recognized in our law and there are many rational reasons why a

difference may be drawn between them. Evidently the Legislature, up to this time, has taken the view that there is a legitimate need and scope for each method of financing public improvements and has seen fit not to disturb the long line of decisions which have clearly established the right to use both of them.

**Estoppel**

In our original brief we showed by overwhelming authority that whether the instruments be bonds or warrants, the City is nevertheless bound by estoppel in either event. Against this position the counsel for petitioner seek to arouse the prejudice of the Court by various inflammatory charges not supported by the evidence, and they appear to assume that the mere repetition of such charges may supply the lack of evidence.

Thus we find in petitioner's brief repeated statements, in effect, that the warrants in question were not escrowed but were already issued before a "lick of work" was done. In our original brief the evidence is carefully analyzed, and it is shown beyond doubt that the warrants were escrowed to be finally delivered only upon estimates as the work progressed, and that they were in fact delivered from time to time on estimates over a period of several months and that the work was progressing during that period, so that by the time the last estimate was approved,

all of the work was finished except the laying of the brick surface on two streets. Then, after Brown-Crummer Company had paid for all of the warrants in question, the contractor was enjoined, and after offering to do equivalent work on other streets, eventually moved away the material it had on the ground and left the city. It is not conceded that at the time of any particular estimate the work theretofore done and material theretofore furnished did not justify same. It is merely conceded that the final result was that the City's share of the job lacked about $15,000.00 worth of work of being finished.

Again, we find in petitioner's brief repeated statements, in effect, that Brown-Crummer Investment Company was well aware of all of the alleged infirmities, that Mr. Crummer is an adventurer unworthy of belief, that Judge Harris is a mere scrivener of false recitals, that J. E. Blaine was an unscrupulous henchman doing their bidding in the dark of night, and that all of them were engaged in a nefarious conspiriacy to perpetrate a fraud upon the simple and confiding officials of the City of Gainesville, who of course, believed every representation they made to be true, and did not know that not a "lick of work" had been done. Indeed, by inuendo, Mr. Crumer is compared with one of J. L. Arlitt, whose name, it seemes, figures as villain in some two or three

important decisions wherein the doctorine of estoppel is nevertheless enforced.

Mr. Crummer's evidence, they say, is suspicious, because he said he was not familiar with the construction contract between the City and contractor, whereas in his letter of June 18th, 1920, to J. E. Blaine, he referred to the requirement that the job be finished in 180 days. They forget that this information is contained in the proceedings of the city council attached to some of the drafts. Also, they point to an isolated expression in his evidence to the effect that he supposed the City officials prepared a certain resolution, but they forget to give his full evidence on the same subject-matter at page 202 of the transcript, wherein he testified that Brown-Crummer Investment Company agreed to furnish the services of a competent attorney to prepare the forms of necessary legal proceedings, and that such proceedings were adopted by the City. It is upon these specious trifles that the attack on Mr. Crummer is based.

Judge Harris, they say, must have known all about every alleged infirmity, yet admittedly he was never in Gainesville, and according to the record, the earliest contact he had with the matter was about December 15th, 1919. The original and basic ordinance on the subject of these warrants was passed on December 16th, 1919. None of the infirmities claimed are disclosed or

suggested by any of the proceeding of the Council on or after that date. There is not a straw in the evidence to indicate that anyone had informed Judge Harris of any of such infirmities or that he ever saw the proceedings had by the Council before Dec. 16, 1919. To be sure, he prepared the form of resolution passed on Dec. 16, 1919, and subsequent resolutions, as was his duty, but he had a right to assume that the City's officials would not pass same until they could do so properly and truthfully, and he had a right to assume that when they did pass such resolutions, the recitations therein contained were true. There is not a straw in the record to suggest that he had the slightest intimation that any of said recitations were untrue. The evidence shows that the City officials in fact acted on the advice of their own City Attorney and believed in good faith that they were acting properly. Even the taking of supporting affidavits from the City officials is suspicious in the mind of the learned counsel for petitioner. Yet, this is a common practice. Brown-Crummer Investment Company was in the business of buying municipal securities in many States. Its authorized officers were not in Gainesville, and in the nature of things could not be located in all of the municipalities where it would have occasion to buy securities, and in the nature of things could not know, of their own knowledge, the existence

or non-existence of the necessary facts to support any given issue of securities. Therefore, it was and is only a matter of common business prudence to require supporting affidavits from public officials. Even the request made by Judge Harris for two clerical corrections in one of the ordinances of the city is a matter of great suspicion in the mind of petitioner's counsel. A sufficient answer to this should be the request itself (Tr. 210-212) and the fact that the corrections were never actually made, as shown by the resolution itself (Tr. 231-250).

As to the alleged knowledge of J. E. Blaine, our original brief contains a full analysis of the evidence on that subject. Blaine was a salaried traveling solicitor, who had no authority whatsoever either to make or change any contract, and he in fact left the employment of Brown-Crummer Investment Company on or about September 1st, 1920, before any of the warrants in question were issued. To be sure, he did have some occasional courtesy contact with the matter after his employment ceased, to the extent, (a) that he received some of the 5% checks from the City, although Brown-Crummer Investment Company had written the City to send such checks direct to them, and (b) that he carried some of the proceedings prepared by Judge Harris in Dallas to Gainesville as a messenger, and hence happened to be present in Gainesville on some two or

three nights when such meetings were regularly held. It is not shown that he inspected the job on such night visits, or that if he had done so he was qualified to determine whether at any particular time there was sufficient work and material in the job to justify a particular estimate. There is no pretense that anyone intimated to him or that he at any time intimated to any representative of Brown-Crummer Investment Company that any particular estimate was not justified by the progress of the job. It is merely presumed that he knew what this record itself does not show to be true, because he was in Gainesville at such two or three night meetings. Furthermore, even if it had been true that at the time of some particular estimate the job had not progressed to a point justifying same, and even if it be true that Blaine had the means of discovering same while in Gainesville at night, there is not a straw of evidence in the record to show that he actually discovered same or that anything was said about it by anyone, or that he ever at any time conveyed such information to Brown-Crummer Investment Company, and the undisputed record shows that at and before all of said time the City officials were in possession of direct and explicit communications from Mr. Crummer and from Judge Harris, informing them of the conditions upon which Brown-Crummer Investment Company was willing to receive and pay for the warrants. These men, as the

City officials well knew, were Blaine's superiors. With that knowledge the City officials nevertheless made the representations herein complained of. All this is fully elaborated in our original brief, and as there shown, it would be unthinkable to now permit the City of Gainesville to take advantage of the alleged falsity of the representations made by its authorized officials.

In connection with all of the foregoing matters, it will be remembered that two courts have already rejected these inflammatory suspicions, including the Trial Court, which had the first-hand opportunity to appraise the witnesses and their evidence, and the Circuit Court of Appeals, which reviewed the record. Both of said courts, according to the rules and standards prevailing in our Federal Courts, have held, and we submit held properly, that there is not in this record enough substantial evidence of probative value to require an issue to be submitted to the jury as to the alleged knowledge of Brown-Crummer Investment Company.

Respectfully submitted,

James E. Martin

E. Cook Martin

Rhodes & Baker

Alex H. Weinberg

Thompson, Knight, Baker & Harris

Counsel for Brown-Crummer Investment Company.

FILED
SEP 17 1927
CHARLES ELMORE CROPLEY
CLERK

No 433.

# In the Supreme Court of the United States

OCTOBER TERM, 1927.

CITY OF GAINESVILLE, PETITIONER,

VS.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR OF H. W. HEAD'S WILL, RESPONDENTS.

## RESPONSE OF H. O. HEAD, EXECUTOR, TO PETITION FOR CERTIORARI.

F. C. Dillard,
Rice Maxey,
*Counsel for H. O. Head, Executor, Respondent.*

H. O. Head,
*Executor, Respondent, for Himself.*

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## RESPONSE OF H. O. HEAD, EXECUTOR, TO PETITION FOR CERTIORARI.

*To the Supreme Court of the United States:*

Respondent H. O. Head says, on page 6 of the petition for certiorari it is stated:

> "There was evidently some outside understanding not shown on the records of the city contemplating that Head should use the proceeds of the warrants in paying for the work that was to be done, and his obligation was that the city should receive the $47,000.00 of paving that he had paid for."

The extent of Head's obligation was as shown on pages 12 and 15 of the record, that he would protect the city by holding the warrants and proceeds until notified by the mayor that the work done by the construction company equaled the required amount.

On page 7 of the petition for certiorari it is stated:

> "The United States District Court instructed a verdict in favor of Head and the surety company doubtless upon the ground that the bond was unenforceable."

The charge, pages 226-227 of the record, recites as the reason for the peremptory instruction that the certificates furnished Head by the mayor showed that his obligation had been fulfilled.

This respondent concedes and believes that the petition for certiorari shows that it should be granted for several good and sufficient reasons. In the first place, we believe that ever since the decision of this court in *Barney* v. *Latham*, 103 U. S. 205, it has been the understanding of the court and attorneys throughout the United States that a case removed from a state to a federal court on the ground of a separable controversy under the Act of 1875 (which on this point is the same as the present statute) carried the whole case and not simply the separable controversy, and not until the Circuit Court of Appeals for the Fifth Circuit in this case, and in the case of *Little Six Oil Co.* v. *Noble*, 17 Fed. (2) 728, decided that only the separable controversy was removed were we aware that that construction of the statute had ever been questioned. Note that the language of both statutes is "*may remove said suit.*"

It is, therefore, of great importance to litigants throughout the United States, and especially to litigants in the Fifth Circuit, that this question be put at rest. Also see *Connell* v. *Smiley*, 156 U. S. 335; *Feibleman* v. *Edmonds*, 69 Tex. 334, 339; *Atlantic etc.* v. *Carter*, 88 Fed. 707.

In the next place there is a direct conflict between the decision in this case and the decision of the Court of Civil Appeals of Texas in the very recent case of *Pulte* v. *Keel, Mayor*, cited by petitioner, on the question of whether the instruments in question are municipal warrants, or are they bonds as they were held to be by the state court? If they are bonds, their invalidity will be, as stated in the opinion of the circuit court of appeals in this case, conceded; but if they are warrants that court holds them to be valid. Until this conflict is settled, suits in the state courts will be prosecuted and decided upon the basis that similar instruments are bonds and invalid, while identical suits in the federal courts will be disposed of on the basis that they are warrants.

In the next place there is a conflict between the decision of the Fifth Circuit Court of Appeals in this case and the decision of the Court of Civil Appeals of Texas in the Pulte case above cited on whether the City of Gainesville, under its charter, is given the power to issue long-time warrants of the kind in question.

In the next place the United States Circuit Court of Appeals for the Fifth Circuit in this case has decided an important question of law, which if not technically in

conflict with, is not in accord with applicable decisions of this court; and practically in conflict with the decisions of the highest courts in Texas; and in conflict with the decided weight of reason and authority. The question referred to is this: Where the charter of a municipal corporation authorizes the city to do a particular piece of work (paving the streets) and pay therefor by the issuance of a particular class of obligations (bonds) has the city the power to have that work done on a credit, and issue in payment therefor another and different class of obligations (long-time warrants)? The City of Gainesville is in its charter given the power to have its streets paved and pay therefor by the issuance and sale of long-time bonds after being authorized by a vote of the tax payers. It can also have such work done by paying therefor out of its current annual revenue, but it is nowhere expressly given the power to have this work done on a credit and pay therefor by its present council appropriating the revenues of future councils for a long series of years by issuing against such revenues warrants in large amounts payable each year. Respondent investment company, contends and the circuit court of appeals in this case holds, that inasmuch as the charter contains no express prohibition against doing this, and affirmatively authorizes in general terms the passage of all ordinances not prohibited by the constitution, unrestricted power in that regard does exist, while petitioner, and this respondent, contend that even if the general power of one council to thus anticipate and appropriate the revenues of future councils be con-

ceded, but which we do not concede, yet where specific provision is made for paying for particular work in a particular way that way is exclusive, even in the absence of restrictive words, and especially is this so where as in this case the charter is specific and emphatic in requiring a vote of the tax payers before even incurring the debt in the way expressly authorized—that authority to a city to incur a particular debt by a vote of the tax payers is a prohibition against incurring that particular debt in any other way. Let us see which of us is correct in the light of the authorities.

In the case of *Head & Armory* v. *Providence Ins. Co.*, 2 Cranch. 127, 169, it is said by Chief Justice Marshall:

> "He who acts by another acts for himself. He who authorizes another to make a writing for him makes it himself, but with these bodies (corporations) which have only a legal existence it is otherwise. The act of incorporation is to them an enabling act. It gives them all the power they possess. It enables them to contract, and when it prescribes to them a mode of contracting they must observe that mode or the instrument no more creates a contract than if the body had never been incorporated."

And in *City of Nashville* v. *Ray*, 19 Wall. 468, which involved the validity of certain city warrants, it is said:

> "Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers, and the creation of specific means excludes others."

In the case of *Zottman* v. *San Francisco*, 20 Calif. 96, 81 Am. Dec. 96, this question is very fully considered by Field, C. J. when on the Supreme Court of California, and we invite especial attention to what is there said, and to the authorities cited in the note to that case in the 81 Am. Dec.

We also invite attention to the reasoning of the Circuit Court of Appeals for the Eighth Circuit in the case of *City of Ft. Scott* v. *Brokerage Co.*, 117 Fed. 51; and to the reasoning of the Circuit Court of Appeals for the Ninth Circuit in the case of *City of Astoria* v. *American, etc.*, 225 Fed. 21.

It has also long been the law in Texas that where authority is given to do a particular thing by a city in a particular way that way is exclusive. This was so held in *City of Bryan* v. *Page*, 51 Tex. 532, in reference to a contract attempted to be entered into by a city with an attorney otherwise than by an ordinance. Also in *Ferguson* v. *Halsell*, 47 Tex. 423, it was so held with reference to the power of a county to sell and convey its land.

The case of *Foster* v. *City of Waco*, 113 Tex. 352, is a decision which we regard as directly in point in principle. That case involved the right of the city to issue long-time notes in the purchase of land for a cemetery. The power was denied upon the ground that the power given to incur debts in the charter by the issuance of bonds was exclusive. The court said:

> "Another rule equally well recognized applies to and controls this case, to-wit: that where a power

is granted and the method of its exercise prescribed the prescribed method excludes all others and must be followed" (citing a number of authorities). "The charter of the City of Waco expressly authorized its board of commissioners to create debts, payable other than out of current revenue, in two ways: First, under Art. 202 *et seq* of its charter by the issuance of bonds upon a vote of the people, payable out of taxes levied for the purpose, as provided for in the state constitution; and second, by the creation of a deficit in a limited amount, payable out of the current revenue for the next succeeding year. The latter provision contained in Art. 211 of the city charter in effect declares that in the event the revenues of the city for any one year should not be sufficient to meet the legitimate expenditures the board of commissioners may incur a deficit over and above the revenues to the extent of $50,000.00, and no more, the excess, if any, over that amount being absolutely null and void."

We are wholly unable to see any difference in principle between the lack of power in a city to purchase property and pay therefor with long-time notes, which must of necessity be met by future councils out of the revenues which they collect, and the purchase of property and the payment therefor by long-time warrants, which must be paid by future councils in the same way that they would have to pay long-time notes issued by their predecessors.

We do not wish to be understood as conceding that authority to a city council in its charter in general terms to pass all ordinances not prohibited by the constitution of the state, even where no particular prohibition is made, would be sufficient to authorize the council to

anticipate and appropriate the revenues of future councils and thereby preclude them for lack of funds from making improvements that would be as necessary and important at that time as the improvements desired to be made by the present council. General language of the kind referred to we believe will be found in practically every city charter throughout the country, and if given the broad interpretation contended for no need for specific grants of power in city charters would exist, but all specific provisions would consist of restrictions. However, what we are now concerned in is the gravity of the question which we think calls for a decision by this court, even though there be no technical conflict. But is there not upon this question such a conflict with both the decisions of this court and of the Supreme Court of Texas as to bring the petition within the recognized practice of this court to take charge of cases of that kind by certiorari? An express conflict should not be required.

Respectfully submitted,

F. C. Dillard,
Rice Maxey,
*Counsel for H. O. Head, Executor, Respondent.*

H. O. Head,
*Executor, Respondent, for Himself.*

FEB 21 1928
CHARLES ELMORE CROPLEY
CLERK

No. 452.

# In the Supreme Court of the United States

OCTOBER TERM, 1927.

CITY OF GAINESVILLE, PETITIONER,

vs.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY AND H. O. HEAD, EXECUTOR OF H. W. HEAD'S WILL, RESPONDENTS.

## BRIEF FOR H. O. HEAD, EXECUTOR, ONE OF RESPONDENTS.

F. C. Dillard,
Ross Maxey,
of Sherman, Texas,
*Attorneys for Respondent,*
*H. O. Head, Executor.*
H. O. Head, Executor,
For Himself.

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No. 433.

# In the Supreme Court of the United States

OCTOBER TERM, 1927.

CITY OF GAINESVILLE, PETITIONER,

VS.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY AND H. O. HEAD, EXECUTOR OF H. W. HEAD'S WILL, RESPONDENTS.

## BRIEF FOR H. O. HEAD, EXECUTOR, ONE OF RESPONDENTS.

### Jurisdiction.

The City of Gainesville, a municipal corporation, sued Lester Levy and Harry D. Levy, who compose the partnership firm of the Southern Construction Company, H. W. Head, who was succeeded by H. O. Head as executor of the will of H. W. Head, deceased, and the Southern Surety Company, in the District Court of Cooke County, Texas.

The city's cause of action against the Levys was the alleged breach by them of a certain paving con-

tract between them and the city. The city's cause of action against H. O. Head, executor, was upon two instruments which H. W. Head executed, as follows:

"Sherman, Texas, September 10, 1920.

"To the City Council,

"Gainesville, Texas.

"Gentlemen:

"By virtue of an order from the Southern Construction Company, any moneys due said Southern Construction Co. from the City of Gainesville for work and materials furnished under a contract for street improvement is to be paid to me, said amounts being payable in city warrants.

"I understand it is now the purpose and intent of the City Council of Gainesville, Texas, to have issued to said Southern Construction Co., $10,000.00 in warrants, these warrants to be properly endorsed by Southern Construction Co., and delivered to me.

"In the event of any dispute, discrepancy, or other contingency arising which might in any way affect the amount of work done or materials furnished by Southern Construction Co., so as to in any way affect said $10,000.00 in warrants, I hereby agree to protect and indemnify said City of Gainesville, Texas, up to the sum of $10,000.00. None of said money will be paid or credited to Southern Construction Co. except in such amounts as may be shown to be due under signature of the Mayor of Gainesville, Texas, and when such amounts shall equal $10,000.00, then this obligation to be discharged.

"In case of suit arising out of the matter set out herein, or in case suit becomes necessary to enforce any rights secured hereby, such suit shall be filed in Cooke County, Texas.

H. W. Head."

(Rec. 12 and 132.)

"Sherman, Texas, October 4, 1920.

"To the City Council,

"Gainesville, Texas.

"Gentlemen:

"By virtue of an order from the Southern Construction Co., any moneys due said Southern Construction Co., from the City of Gainesville, Texas, for work done and materials furnished under a contract for street improvement is to be paid to me, said amounts being payable in city warrants. I understand that it is now the purpose and intent of the City of Gainesville, Texas, to have issued to said Southern Construction Co. $37,000.00 in warrants, these warrants to be properly endorsed by the said Southern Construction Co., and delivered to me.

"In the event of any dispute, discrepancy or other contingency arising which might in any way affect the amount of work done or materials furnished by Southern Construction Co., so as to in any way affect said $37,000.00 in warrants, I hereby agree to protect and indemnify said City of Gainesville, Texas, against loss of any character whatsoever up to the sum of $50,000.00. None of the said moneys will be paid to or credited to said Southern Construction Co., except as in such amounts as may be shown to be due by an estimate duly allowed and signed by the Mayor of Gainesville, Texas, and when such amounts shall equal $37,000.00, then this obligation will be discharged.

"In case of suit arising out of the matter set out herein, or in case suit becomes necessary to enforce any rights secured hereby, such suit shall be filed in Cooke County, Texas.

H. W. Head."

(Rec. 12 and 132.)

The city's cause of action against the Southern Surety Co., was upon two instruments which it executed as surety for H. W. Head. Head answered, setting up

several grounds of defense, among which was that the instruments called warrants issued by the city, mentioned in the instruments executed by H. W. Head, were issued without lawful authority and were invalid and of no value. The city replied, asserting the validity of the alleged warrants, but prayed in the alternative that if Head succeeded in establishing them to be invalid that they be cancelled, and that Brown-Crummer Investment Co., the present owner of the warrants, be made a party in order that the decree may be binding upon it. Brown-Crummer Investment Co., answered, asserting the validity of the warrants, and prayed for a decree so declaring.

Plaintiff city was alleged to be a Texas corporation and defendant Head was alleged to reside in Texas. The residence of both the Levys was alleged to be unknown to plaintiff. The Southern Surety Company was alleged to be an Iowa corporation. The Brown-Crummer Investment Co., was alleged to be a Kansas corporation.

It is stated in the record in a stipulation on page 120 that the Brown-Crummer Investment Co., filed petition to remove to the Federal Court upon the ground of a separable controversy, and that there was a motion to remand by the city which was overruled (R. 120). Lester and Harry Levy are necessary parties to any suit between the City and Brown-Crummer Investment Co., to cancel the alleged warrants, they being endorsers thereof (R. 18). There is no controversy between the City and Brown-Crummer Co., as to the validity of the alleged warrants. They both assert their

validity and there can be no controversy between them until after the alleged warrants are cancelled in a suit in which the Head estate and the Levys are parties.

AUTHORITIES.

*Wilson* v. *Oswego Township*, 151 U. S. 56.
*Torrence* v. *Shed*, 144 U. S. 527.
*Graves* v. *Corbin*, 132 U. S. 571.
*Extended note to Miller* v. *Clifford*, 5 L. R. A. (N. S.) 49.

In this litigation we have had no desire to thrust ourselves between the Brown-Crummer Investment Company and the City of Gainesville, or to become a partisan of either; but, believing that the instruments in controversy, whether bonds or warrants, are invalid—if bonds because not submitted to the vote of the qualified taxpayers, if warrants beyond the charter powers of the city—and, if invalid, affording no ground of action for any purpose, we have deemed it proper to make the defense irrespective of the defense that Mr. H. W. Head, in collecting the moneys from the Investment Company and paying them to the Southern Construction Company, acted under the direct authorization of the City. The record shows that the defense was made before the Investment Company was a party to the proceeding, indeed that because of this defense the City made it such party, praying in the alternative that if the instruments were held to be invalid they should be cancelled. The record further shows that a judgment by default was rendered against Mr. H. W. Head and promptly appealed from by him and reversed. Pending such appeal,

he died and Mr. H. O. Head as executor became a party to the suit. Since it can in no way affect the suit, we hope we may say without impropriety that the reason of the default judgment against Mr. Head was because he was called away from home to the bedside of a dying friend and overlooked filing an answer by default day.

Believing, as we have said, that the instruments in controversy are invalid, we shall state our reasons for this belief before showing that whether they are invalid or not there can be no recovery against the Head Estate.

## STATEMENT OF THE CASE.

This respondent will supplement petitioner's statement of the case by adding that the City's alleged cause of action against H. W. Head was based on two written instruments copied on pages 1 and 2 of this brief.

This respondent's amended answer consisted of a number of defenses, among which were the following:

> "IV. That the alleged warrants were invalid for various reasons, and therefore were of no value (Rec. 65).
>
> "VIII. That the City elected to take judgment against the Southern Construction Company for its damages, thereby treating the warrants as the property of the Construction Company" (Rec. 76).
>
> "IX. That said Head delivered all the warrants deposited with him and their proceeds as directed in the instruments of deposit under proper resolutions passed by the city council" (Rec. 77).

Other allegations were contained in the answer not necessary to mention, as the evidence was confined to those above indicated, and the charge of the court as to said respondent was confined to the last one (Rec. 226). The following evidence bearing upon this issue was introduced:

On April 6th, 1920, the city council passed a resolution (see Record 251-254), which related to the first warrants amounting to $3,000.00, as follows:

"A Resolution.

"Auditing and allowing estimate of the Southern Construction Company, for materials furnished and work performed in the construction of street improvements in and for the City of Gainesville, Texas.

City Hall, City of Gainesville, Texas,
April 6th, 1920.

"The city council of the City of Gainesville, Texas, met in regular session, in the city hall, in said city, on this, the 6th day of April, 1920, at which meeting the mayor, aldermen, and city secretary were present, when the following proceedings, among others, were had, to-wit:

"The mayor offered for consideration and passage a resolution providing for the allowance of estimate or claim of The Southern Construction Company, contractor, for materials furnished and work performed in the construction of certain street improvements in and for the City of Gainesville under its contract with the said Southern Construction Company, of date November 20, 1919.

"Moved by Alderman Buckingham, seconded by Alderman Bramble, that the resolution be adopted.

"Ayes: Aldermen Thomas, Beck, Bramble, Howell, Lewis, Puckett, Kendall and Buckingham.

"Nays: None.

"The resolution follows:

"Whereas, on the 20th day of November, 1919, the City of Gainesville entered into a contract with the Southern Construction Company, contractor, for the construction of certain street improvements in and for said city; and,

"Whereas, the said Southern Construction Company has furnished materials and performed labor in performance of said contract and in accordance with the plans and specifications at-

tached to said contract and made a part thereof, and for said materials and work the said Southern Construction Company has presented to this council their first estimate and claim covering the cost thereof to the city, which claim and estimate is in words and figures as follows, to-wit:

"Estimate No. 1.

To the City Council of the City of Gainesville, Texas:

Gentlemen:

"I present to you below Estimate No. 1, being claim for materials furnished and work performed under contract with the City of Gainesville, Texas, of date November 20, 1919, for partial cost of construction of street improvements provided for in said contract, to-wit:

| | |
|---|---|
| "For Gravel Base, Gutters and Excavation between Haight and Gorham Streets on Dixon Street ..... | $3,300.00 |
| "Less Ten Per Cent retained..... | 300.00 |
| | 3,000.00 |

Respectfully submitted,
Southern Construction Co.,
By Lester Levy,
Contractor.

"And, whereas, the materials so furnished and the work performed and covered by said claim has been by this council inspected and accepted by the city to be in accordance with the contract, and the plans and specifications adopted by this council and determined by this council to be well worth the price agreed to be paid therefor as reflected in said claim and statement of account; and,

"Whereas, said claim has been duly audited and found to be correct, and has been approved.

"Therefore, be it resolved by the city council of the City of Gainesville, Texas, that the claim

of the said Southern Construction Company, covering materials furnished and labor performed in the construction of said street improvements aggregating the sum of $3,000.00 be, and the same is hereby allowed.

"That in accordance with the terms and provisions of said contract, and the claim of the said Southern Construction Company presented to this council, there shall be delivered to the said Southern Construction Company, City of Gainesville Street Improvement Warrants, Series A-1, to the amount of $3,000.00, being warrants numbers one (1) to three (3) inclusive, in the denomination of one thousand ($1,000.00) dollars each, dated November 20th, 1919, bearing interest at the rate of six per cent (6%) per annum, authorized to be issued by ordinance duly passed by the city council of said city on the 16th day of December, 1919, and recorded in Book 6, at pages 583, *et seq.*, of the minutes of this council, evidencing the indebtedness due by said city to the said Southern Construction Company, their assigns or bearer.

"That the City of Gainesville has received full value and consideration for the warrants herein authorized to be delivered.

"Passed this the 6th day of April, 1920.

"Approved this the 7th day of April, 1920.

(Seal) (Signed) E. N. Blackburn,
Mayor, City of Gainesville, Texas.

Attest:
S. A. Bryan,
City Secretary, City of
Gainesville, Texas."

On September 22, 1920 (see Record 258), the city council passed another resolution identical with the one of April 6, 1920 copied above, except that it related to warrants 41 to 50 inclusive and the amount of the estimate approved was $10,000.00 (Record 258). This made $13,000.00.

On October 5, 1920, the city council passed another resolution identical with the one of April 6, 1920, copied above, except that it related to warrants 24 to 40 inclusive and the amount of the estimate approved was $17,000.00 (Record 258-259). This made $30,000.00.

On Nov. 2, 1920, the city council passed another resolution identical with the one of April 6, 1920, copied above, except that it related to warrants 14 to 23 inclusive and the amount of the estimate approved was $10,000.00 (Record 259-260). This made $40,000.-00.

On November 16, 1920, the city council passed another resolution identical with the one of April 6th, 1920, copied above, except that it related to warrants 4 to 13 inclusive and the amount of the estimate approved was $10,000.00 (Record 260). This completed the $50,000.00.

All of these resolutions bore the signature of the mayor (Record 254), and were delivered to Mr. Head and by him transmitted to Brown-Crummer Company (Record 251-260).

The Texas Court of Civil Appeals, on a previous appeal, construed the instruments executed by Head in an opinion as follows:

> "What Head agreed to do and what the surety company by its bonds bound itself he would do was to protect and indemnify appellee against loss in the event of any dispute, discrepancy or other contingency arising which might in any way affect the amount of work done or materials furnished by the construction company so as to in any way effect the warrants issued by

appellee to the construction company and by it, the construction company, endorsed and delivered to him.

"That Head was a mere trustee of the parties for the purpose of holding possession of the warrants until he was directed by appellee's mayor to deliver them to the construction company, is plain, we think. It was not alleged that he did not have the warrants in his possession or was not holding them as agreed upon, or that he had in any way violated the trust. If he was holding them as agreed upon, certainly appellee had no right to maintain this suit against him, and of course if it could not maintain it against him it could not maintain it against the surety company as his surety."

In answer to a motion of the City for a rehearing, the court said:

"If this court erred, as appellee insists it did, in holding that it appeared that Head was a mere trustee for the purpose of holding possession of the warrants, the conclusion reached that a cause of action was not stated against him nor against the surety company was nevertheless correct, we think, because it did not appear from the allegations in the petition that a dispute, discrepancy or other contingency arose which in any way affected the warrants turned over to Head. If Head held the warrants, and it was not alleged he did not hold them, and if he had not paid or credited any of same to the construction company except in such amounts as were shown by estimates duly allowed and signed by the mayor, and it was not alleged that he had, he had not breached his undertaking, and a cause of action against either him or the surety company did not exist. 254 S. W. 323."

District Judge Estes, who tried this case in the court below, construed the instruments executed by Mr.

Head as making him a custodian of the warrants to be held and disposed of as set forth therein, as had the state court. In his charge to the jury (Record 226-227) he said:

> "The evidence shows, in my opinion, that the city council had authority under its charter to execute the contract in question, and likewise to place the warrants with Mr. Head under the conditions disclosed by the evidence. It is my idea that the conditions of the obligation assumed by him have been discharged—that is, certificates over the signature of the mayor of the city, attesting that work was done by the contractor to the value of said warrants, were furnished him. In this state of affairs, I do not think judgment can properly be rendered against his estate herein. * * *
>
> "There is, therefore, no issue of fact for you to settle. You are, therefore, directed to return a verdict in the form hereto attached."

The form of the verdict referred to in the Judge's charge, and the one returned by the jury, is as follows:

> "We, the jury, find in favor of Brown-Crummer Investment Company against the plaintiff, City of Gainesville, in the sum of $13,125.40, with interest thereon at the rate of six per cent per annum from date hereof, together with all costs.
>
> "We further find in favor of H. O. Head, executor of the estate of H. W. Head, deceased, and Southern Surety Company, upon the causes of action asserted by the City of Gainesville against them" (Record 122).

The judgment rendered followed the verdict (Record 123-125).

H. W. Head's connection with the Southern Construction Company was that of a creditor, as appears from the following correspondence:

On January 5th, 1921, R. E. Crummer wrote Mr. Head in reference to the warrants which he had sent them, in which he said:

> "Just as a matter of record and in order to complete our files, we would thank you to kindly advise us of your connection with this transaction" (R. 209).

To which Mr. Head replied:

> "My connection with the transaction is simply that I have advanced the Southern Construction Company, who is doing the work, an amount of money for security for which I took an assignment of all that was to be paid to that company by the city and the citizens for the paving work done by it" (R. 201).

## ARGUMENT.

Brown-Crummer's contention is that the City of Gainesville only had power to issue *bonds* to a limited amount after being authorized by a vote of the property owners, but the city council had authority to issue long time warrants to an *unlimited* amount without being authorized by the voters. That this should not be and that the court will not so construe the charter if it can be avoided, we think all will agree. At the outset, we will remark that it does not change an instrument from a bond to a warrant to call it a warrant. We think a given instrument is one or the other as decided by the terms of the contract evidenced thereby, rather than by the name the parties seek to give it. Decisions under one charter or law have but little application to a different charter or law. Decisions under the general laws of Texas conferring powers upon the commissioner's courts of her counties in reference to providing public buildings and paying expenses of the counties, have but little, if any, application to the powers conferred by special acts upon city councils in reference to imposing debts upon cities.

We understand it to be conceded, and the Circuit Court of Appeals so holds, that if the instruments here involved are bonds, they are invalid for the numerous reasons set forth in petitioner's brief, so that the first question for decision is whether such instruments are warrants, as claimed by Brown-Crummer Company, or are they bonds, as claimed by petitioner and this re-

spondent. A warrant is clearly defined in 2 Dillon on Municipal Corporations, 5 Ed. Secs. 850 and 851, as follows:

> "Sec. 850: A warrant is the command of the council, board or official whose duty it is to pass upon the validity and determne the amount of a claim against the municipality, to the treasurer to pay money out of any funds in the city treasury which are, or may become, available for the purpose specified to a designated person whose claim therefor has been duly adjusted and allowed.
>
> "Sec. 851: Being merely devices for liquidating the amount legitimately due to the creditors of the municipality, and instruments necessary to carry on the machinery of a municipal administration, the power to issue warrants or orders on the municipal treasury, although not expressly conferred, may be implied as incidental to municipal or *quasi* municipal corporations whenever it is not prohibited or restricted by constitution, charter or statute. Being simply a means of paying a debt, it is necessarily implied that a valid debt or obligation of the corporation exists for which a warrant may be drawn. The warrant does not constitute a new debt, but is only the prescribed means for drawing money from the municipal treasury to pay an existing debt. Without express authority from the legislature a municipality cannot discount its warrants to its creditors so as to make them equivalent to cash, or issue warrants for more than the sum actually due the claimant, and as to the excess, they are void and the holder will be treated only as the equitable assignee of the valid legal claim of the payee. To give a warrant validity it is essential that it should be delivered to the person entitled thereto."

That these instruments are bonds within the meaning of the charter of the City of Gainesville, and that

the city is without power to issue long time warrants, has been twice directly decided by the Court of Civil Appeals of Texas in the recent cases of *Pulte* v. *Keel*, 297 S. W. 241, and *Childers* v. *Shepherd*, not yet reported, a copy of the opinion in which, however, we will file with the clerk of this court.

We think there can be no question but that if these instruments had been called bonds, instead of being called warrants, they would have been so treated. Note that they were issued for the purpose of raising money to pay for work to be done in future for which purpose bonds were authorized to be issued, while a warrant is an order on the treasurer to pay a debt already incurred, the amount due upon which is already fixed and determined. We think the fact that authority is expressly given in the charter to provide for debts of this kind by the issuance of bonds, and is not given to provide for them by the issuance of warrants, should be controlling in determining that these instruments are bonds and not warrants.

**Instruments Invalid Even if Warrants.**

If, however, it should be held that the instruments in question are warrants and not bonds, we now propose to demonstrate that they were issued without authority on the part of the city council and are invalid. We shall not undertake to discuss the numerous cases from the higher courts of our state cited by those endeavoring to sustain the warrants. In our opinion they are all distinguishable from the instant case, but to undertake to point out those differences would be to pro-

long this brief to great length and impose upon the time and patience of the court.

The very case of *Lasater* v. *Lopez*, 110 Tex. 179, so strongly relied upon, seems to us, when correctly read in the light of the constitution and the decisions, instead of being an authority sustaining the position of plaintiff in error, to militate against it. The thing decided in that case was this: That for years under existing statutes commissioners' courts had authority to issue long time warrants in payment of certain improvements; that a true construction of the Act of 1903, in connection with those statutes and under the constitution, showed that that act did not repeal the prior acts, and hence did not take away the power of the commissioners' court to issue such warrants. But it is important to note that before the passage of the Act of 1903 the power of the commissioners' court to issue warrants existed only by virtue of statutes giving such power, either expressly or by *necessary* implication. The thing that was decided was that the right of issuing warrants sprang from the constitution and statutes issued thereunder, and that such right was not repealed by the Act of 1903. This the court in its opinion made quite plain.

Assuming, as we have done, that the instruments attacked in the case are warrants, the question is whether under the grant of power from the legislature to the City of Gainesville the city had the authority to issue the warrants. That power, if it exists, is to be found in the charter of the city. If it is there found the warrants are valid. If it is not found there they

are invalid. Just here the investment company seems to have wandered away from the true rules which govern in determining what are the powers a city may exercise under its charter. In their brief herein the position they take is, that inasmuch as there is no express prohibition in the charter against the issuance of such warrants, the power of the city council is practically unrestrained.

We do not so understand the law. We do not understand that a city may do anything and everything which is not expressly forbidden by its charter. Take a single illustration: Although a charter may not forbid the issuance by a city of negotiable instruments we do not understand that, therefore, a city may issue such instruments. Indeed, in the very case of *Lasater* v. *Lopez*, referring to the commissioners' court, it was declared that without special authority such court could not issue negotiable securities. The court further said: "It is not a power to be implied. It does not exist unless expressly conferred by law."

We are making this illustration not to declare or intimate that the instruments involved in this suit are negotiable securities, for we are meeting plaintiff in error on his own ground and treating them as warrants and not negotiable but we are making it as an illustration to show that the investment company is wrong in its apparent contention that a city may do anything which its charter does not forbid it to do. We understand the true rule to be this: That before it can do aught the right to do that thing must find warrant in the charter. It must be either expressly granted or

*necessarily* implied from powers which are granted, or indispensable to the exercise of those powers. A charter of a city is not an instrument restricting the powers the city would otherwise have, but it is an instrument granting to it, either expressly or by necessary implication, all the powers which it has. It is not a restricting, but is an enabling instrument. We take this to be well settled law. We shall not cite numerous decisions, as we could easily do, to sustain this statement, but shall content ourselves with a quotation from the case of *Foster* v. *City of Waco*, 113 Tex. 352, to which we shall make reference further on. There it is said:

> "It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers and no others*: First, those granted in *express words;* second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. 1 Dillon on Municipal Corporations (5th Ed.), Sec. 237; 28 Cyc. p. 1533; 19 R. C. L., Sec. 75; *City of Brenham* v. *Brenham Water Co.*, 67 Tex. 542, 553, 4 S. W. 143; *The Citizens Bank* v. *The City of Terrell*, 78 Tex. 456, 14 S. W. 1003."

We think that whether an act may be done by a municipality under its charter may be expressed in these five words: "to doubt is to deny." We believe this to be undisputed law, except as it is disputed by counsels' brief herein.

With the rule established for determining the powers of the governing board of a city, as it is established by the quotation we have made from the Foster case, we come now to determine whether under its charter the City of Gainesville had the power to issue its long time warrants for the purposes for which they were issued—whether or not under the charter those warrants are valid or invalid. To establish the validity of the warrants counsel rely upon Section 3 of Art. II of the charter. Such reliance, to our minds, evidences the weakness of their position. Let us analyze that section and see what is its true construction. For convenience in this analysis the section is here copied as follows:

> "Powers of Ordinance—The City of Gainesville shall have power to enact and enforce all ordinances necessary to protect health, life and property, and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the city and its inhabitants, to protect lives, health and property of the inhabitants of said city, and to enact and enforce any and all ordinances upon any subject; provided, that no ordinance shall be enacted inconsistent with the laws of the State of Texas, or inconsistent with the provisions of this act; and provided further, that the specifications of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this act to grant to and bestow

upon the inhabitants of the City of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter or by some general law of the State of Texas, or by the provisions of the Constitution of the State of Texas" (Rec. 229).

In the first part of the section, down to the first word "provided" the charter is declaring the general powers of the city. What are the general powers marked out in the section? They are to protect life, to prevent, abate and remove nuisances, to preserve and enforce the good government, order and security of the etiy and its inhabitants, to protect lives, health and property of the inhabitants of the city, and to enact and enforce all laws upon the subject. But it is intended to be more specific, more particular, as to a number of things coming under these general powers. Therefore, and in order that the specification of these things may not be held to exclude the enactment of ordinances under the general powers set forth in the section the further provision is made that the specification of particular powers shall never be construed as a limitation upon the general powers *herein* granted. Having made this reservation, the charter in subsequent sections of this article proceeds to confer upon the city particular powers, all of which are embraced within the general powers declared in the section, but under the reservation that the conferring of these particular powers is not to prevent the passage of other ordinances if embraced within the general powers granted in the section. But the section proceeds: "it being in-

tended by this act to grant to and bestow upon the inhabitants of the City of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter or by some general law of the State of Texas, or by the provisions of the Constitution of the State of Texas." This does not broaden or increase the powers of the city. This clause is a part of the same paragraph providing that the specifications of particular powers shall never be construed as a limitation upon the general powers *herein* granted. The power to act must still be found in the charter. It must arise either by express declaration or by necessary implication from that which is declared. The grant is that it may exercise all powers of municipal government not prohibited by this charter or by some general law of the State of Texas or by the provisions of the Constitution of the State of Texas; but the powers of municipal government are, to repeat, only those warranted by the charter. To hold that the words of this section mean more than this would be to confer upon a municipality unheard of powers—to attribute to the legislature granting the charter a certain degree of mental aberration. In fact, render useless all specific *grants of powers* in municipal charters. The prohibition to do certain things does not arise because the charter does not use the words "thou shalt not" but arises as well from what it is declared may be done. To give a simple illustration:

In Sec. 7 of Art. II it is provided that the city may require a street railway to keep in repair bridges from curb to curb, and in section 9 it is provided that

the city may cause a street railway to pave the part of the street occupied by it, and then it is declared that the portion of the street so occupied shall be deemed to be the space between the tracks and twelve inches on the outside of its rails. Now, while there is nothing in the charter declaring that the city might not pass an ordinance commanding a street railway to keep its bridges in repair, not only from curb to curb, but for a foot on each side of said curb, while there is nothing in the charter saying that the city may not pass an ordinance commanding a street railway to pave three feet on each side of its tracks, yet these declarations which are made in Sections 7 and 9 operate a probition on the city so that it can not make requirements of the street railway in these particulars other than are allowed by these sections. Thus we see that the provisions of this section by no means have the very broad meaning for which counsel contend.

The position we have taken, we think, is sustained by our own authorities. For instance, in the early case of *Pye* v. *Peterson*, 45 Tex. 312, it was held that a clause in the charter of the City of Navasota which gave the power to "ordain and establish such acts, laws, regulations, and ordinances not inconsistent with the constitution or laws of this state, as shall be needful for the government, interests, welfare, and good order of said body politic" did not confer power to prescribe fire limits, the court in the opinion using this language:

> "We are of opinion that the general grant of power to establish ordinances needful for the welfare of the city did not authorize the passage of such ordinances as the one in question.

> "Municipal corporations can exercise those powers only 'which are expressly or impliedly conferred, subject to such regulations or restrictions as are annexed to the grant' (Cooley on Const. 192).
>
> "'The general disposition of the courts of this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them; thus applying substantially the same rule that is applied to charters of private corporations. The reasonable presumption is, that the state has granted, in clear and unmistakable terms, all it has designed to grant.'"

If this case has ever been called in question we are not aware of it. On the contrary, we find that it was specifically followed in the case of *Crossman* v. *Galveston*, 112 Tex. 303. The powers there granted the city were very broad, as appears at page 308 of the opinion; but notwithstanding their breadth, it was decided by the court that they did not authorize the enactment of an ordinance declaring a building which had become dilapidated a nuisance and providing for its removal.

The same views entertained by the courts of Texas with reference to the powers of municipal corporations prevail in the Supreme Court of the United States and if not in all, then surely in practically all, of the appellate courts of the states of the union. This general doctrine as to corporate powers is set forth in the case of *Head & Amory* v. *Providence Ins. Co.*, 2 Cranch. 127, p. 168, where Chief Justice Marshall uses this language:

> "An individual has an original capacity to contract and bind himself in such manner as he pleases * * *; but with these bodies (corporations) which have only a legal existence it is otherwise. The act of incorporation is to them an enabling act. It gives them all the power they possess. It enables them to contract, and when it prescribes to them a mode of contracting they must observe that mode or the instruments no more create a contract than if the body had never been incorporated."

See also *City of Nashville* v. *Ray*, 19 Wall. 468; *City of Ft. Scott* v. *Brokerage Co.*, 117 Fed. 51; *City of Bryan* v. *Page*, 51 Tex. 532; *Ferguson* v. *Halsell*, 47 Tex. 421; *Foster* v. *City of Waco*, 113 Tex. 352; *Parks* v. *West*, 102 Tex. 11, 16, where it is said: "It is a rule for the construction of constitutions constantly applied, that where a power is expressly given and the means by which, or the manner in which, it is to be exercised is prescribed, such means or manner is exclusive of all others" (6 Am. & Eng. Ency. Law, 928, and cases cited). *Crabb* v. *Celeste Independent School District*, 105 Tex. 194, 198, where it is said: "It is an accepted rule of construction that where a power is expressly given by the constitution (charter of a city) and the mode of its exercise is prescribed, such mode is exclusive of all others" (*Parks* v. *West*, 102 Tex. 11).

We think, then, it can not be doubted that the section relied upon by counsel does not confer upon the city the power to issue long time warrants.

Having seen that Sec. 3 of Art. H has to do with only the passage of ordinances relating to the general and particular powers set forth in that article, we must

look elsewhere in the charter to find the right of the city to pave the streets and make payment for such pavement. This brings us to Art. IV, making specific provisions for such pavement and the means of paying for it. We copy from that article as follows:

> "Sec. 1. The city council of the City of Gainesville shall have power and authority by ordinance duly passed if it so elects to borrow money on the credit of the city for permanent improvements, for public buildings, for the improvement of its streets, avenues, alleys, public grounds, building of sidewalks, macadamizing, remacadamizing, paving and repaving of streets, alleys, avenues and public grounds and for the purpose of providing the city with funds for the ownership of public utilities, including water, light, sewer and gas works; and the council may issue bonds for the City of Gainesville for all or any of the above purposes to any amount not exceeding $150,000 in any one year; provided, that in addition the said city is expressly authorized to issue bonds for the purpose of refunding the bonds of the city previously issued; provided, that the bonds be refunded at the same or a lower rate of interest than the bonds proposed to be retired draw. It is further provided that debt shall never be created by the City of Gainesville unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon.
>
> "No bonds shall be issued for any purpose except for the purposes above named which shall not exceed $150,000 for any one year and for the purpose of refunding bonds previously issued.
>
> "No bonds shall be issued for any purpose in excess of $2500 unless an election be ordered by the mayor and city council, and if at said election the majority of the votes polled shall be in favor of creating such debt it shall be lawful for the city

> council to make the issuance of the bonds as proposed in the ordinance submitting the same at the election so held, but if a majority of the votes polled shall be against the creation of such debt it shall be unlawful for the city council to issue the bonds."

The article authorizes the paving of the streets, authorizes the borrowing of money to pay for such pavement and provides that the council may issue bonds for such purposes. It is on these two words "borrowing" and "may" that counsel seem to hang their hopes of sustaining the warrants in this case, but, in our judgment, an analysis of Article IV destroyed such hope. The article authorizes the council, if it so elects, to borrow money on the credit of the city for permanent improvements, for paving streets, and for the several other purposes named, and then provides that the council may issue bonds for (of) the City of Gainesville for all or any of the above purposes, to an amount not exceeding $150,000 in any year. What are the purposes above named? Not simply the borrowing of money, but the various things named in the article. Had the charter intended that the bonds should be issued only when money was borrowed, then it would have provided in appropriate words that the council might issue bonds for the money thus borrowed. This, however, it did not do, but provided that they might issue bonds for all or *any* of the above purposes. Therefore, if a contract was entered into for paving streets or other permanent improvement the bonds might be issued to the contractor in payment of the amount owing by the city under the contract. It is evident that the power to

issue bonds is not confined only to the borrowing of money. Nor does the use of the word "may" render the hope of counsel any rosier. It will not be denied that paving the streets is a permanent improvement and embraced within the terms of this article, and the issuing of bonds or warrants in payment therefor a public purpose. Without citing other authorities we find the law thus stated by our Texas Supreme Court:

> "Whether the word 'may' in a statute is permissible or obligatory depends in a great measure upon the true intent and object of the Legislature in making the enactment. It means 'must' whenever third persons or the public have an interest in having the act done or have a claim *de jure* that the powers shall be exercised." *Rains* v. *Herring*, 68 Tex. 468, p. 472.

In *Smalley* v. *Paine*, 102 Tex. 304 at p. 305, it is said:

> "The rule in the construction of statutes is universally established in the courts of common law that the word 'may' means 'must' 'whenever third persons or the public have an interest in having the act done or have a claim *de jure* that the power be exercised.' The rule has been recognized in other decisions of this court."

Quoting from the case of *Rock Island, etc.* v. *U. S.* 4 Wall. 435, the court say:

> "The conclusion to be deduced from the authorities where power is given to public officers in the language of the act before us, or in equivalent language, whenever the public interest or individual rights call for its exercise the language used, though permissive in form, is in fact peremptory."

What, then, is the true construction of Art. IV? It is this: That when the City of Gainesville has determined to do one of the things provided for in the article and incur an indebtedness therefor, running over a long time, it can not, to evidence such indebtedness, execute merely warrants ordered by its council, but it *must*, not it *may*, provide for the payment of such indebtedness by bonds duly authorized by a vote of the people in the manner provided by the charter. Under well established rules of law, as we understand them, in this way, and in this way only, can a long time indebtedness be incurred by the city for the purpose of paving or other public improvement. These same principles, we understand, are the foundation of the decision in the case of *Foster* v. *City of Waco*, above cited, which we shall now more specifically notice to show how apposite it is to the instant case. The basis upon which counsel endeavor to place that decision is entirely too narrow. The true basis is that which we have outlined above: That in order for a city to incur an indebtedness the power to incur it must be given either by express declaration or by necessary implication, that when the method by which it may be incurred is provided by the charter that method is exclusive.

The charter of the City of Waco in Art. 201 provides:

> "The commissioners shall have power to control and manage the finances of the city, to prescribe its fiscal year and fiscal arrangement, *to make all contracts in the management of the city's affairs and provide for the payment of its debts and expenses;* provided that it shall not make

and contract for a public service for a longer period than ten years" (italics ours).

Here is given specific power to the city to make all contracts in the management of its affairs and to provide for the payment of its debts. There is not by anything here affirmatively declared placed a restriction upon the method by which these debts shall be evidenced. If we look to this article alone there is no affirmative inhibition against the execution of the notes condemned. This article, under the construction given by counsel to Sec. 3 of Art. II of the Gainesville charter, would have authorized the execution of notes, just as much as Sec. 3, Art. II authorized the execution of warrants in the instant case. But the court looked to Art. 211 and found that under that article the city could incur debts in a limited amount on account of a deficit. It then looked to Art. 202, and there found this provision:

> "It shall have power to issue bonds upon the city for the purpose of making permanent improvements or for any other public purpose in such sums and such amounts as may be necessary or expedient; provided that said bonds shall have been first authorized by a majority vote cast by the duly qualified taxpaying voters, as shown by the last preceding tax rolls of the city voting at an election held for that purpose."
> (The remainder of the article need not be quoted.)

Now before we notice what further the court say, note that Art. 202 does not forbid the issuing of notes, does not declare that the city may not issue long time warrants, does not declare that to evidence the indebtedness the city shall issue bonds, but only declares

that the city shall have *power* to issue bonds. The words "shall have power" used in this article have no stronger meaning than the word "may" used in Sec. 1 of Art. IV of the Gainesville charter. We have seen that the true construction of that word as there used is "must." So here the true construction of the words "shall have power" is that they are equivalent to the word "shall" and this is shown by the decision itself. The court declare:

> "Since the charter of the city especially provided that it may incur debts by means of bonds and the deficit provided for in Art. 211, and since the purchase of cemeteries is plainly within the purview of both provisions, it follows under the rule announced that these methods are *exclusive*, and since the notes and contracts were not executed in substantial compliance with either *they are void.*"

At p. 55 of their brief counsel for the Investment Company say:

> "It might also be added in passing that the notes issued were negotiable notes, and it is a well settled rule of charter construction that the power to issue negotiable notes will not be implied, and that familiar rule of construction would, alone, have been sufficient to take care of the Waco case."

But unfortunately for the contention of the Investment Company, and granting to the full, if need be, that a city can not without express authorization issue its negotiable securities, the court does not place its decision on this ground, but does place it on the grounds that the method provided by the charter for

the incurring of the indebtedness is exclusive, and that no power will be implied unless the implication is indispensable to the carrying out of the expressed powers. The court say:

> "It is apparent that authority to execute and issue long time notes is not indispensable under the charter of the City of Waco to the exercise of the power to purchase cemeteries" (p. 355).

And further:

> "A municipal power will be implied only when without its exercise the express duty or authority would be rendered nugatory."

Counsel for the Investment Company criticise the decision of the court of civil appeals in the case of *Pulte* v. *Keel* and say the court rendering it made an unconscious departure from the well settled law of this state. So far from this being true, we think there is no such departure and that the court were fully aware of what they were doing, and based their well considered opinion upon the law of this state and upon sound principles announced by this Honorable Court. The opinion is not hard to understand. Reduced to its simplest terms it is this: The instruments in controversy have all the characteristics of bonds, including negotiability; but under its charter the City of Gainesville has the power to issue only bonds to secure long time indebtedness for the purposes intended, and these instruments having been issued without compliance with the charter prerequisites for the issuance of valid bonds are therefore void.

Counsel in construing the instruments in controversy say in substance it was the intention of the coun-

cil of the City of Gainesville to issue warrants, and therefore those instruments are warrants. If the city had power to issue either warrants or bonds for the purposes for which these instruments were issued, then if the instruments are ambiguous the intention of the city might be of force in construing them, but surely no one would have the temerity to hold that if the city had no power to issue long time warrants for public improvements then the intention of the city would render the instruments valid, whether you call them warrants or anything else. While speaking of this question of intention it may not be amiss to say that in our opinion it never could have been the intention of the Legislature in granting the City of Gainesville its charter and in providing for the issuance of bonds authorized by a vote of the taxpayers to secure a long time indebtedness, to practically nullify this provision by permitting the council to disregard it and issue warrants to secure such indebtedness. Can it be contended that when the charter in making provision for long time bonds provided that they should be issued only by a vote of the people, at the same time intended that the city council should be unlimited in the amount of long time warrant indebtedness it would be authorized to incur without any vote? We do not believe that anyone after reading the charter of the City of Gainesville can for a moment hesitate in deciding that the leading purpose and intention of the Legislature was to guard the city against being overwhelmed with debt incurred by the city council without a vote of the people. We think it can not be doubted that in grant-

ing the charter the Legislature did not for a moment entertain the idea of turning the city over, as to the amount of indebtedness to be imposed upon it by the uncontrolled discretion of the city council. Under the insistence of counsel the city council of Gainesville, unless prohibited by express declaration, can issue long time interest bearing warrants sufficient in amount to consume all possible revenue the city can hope to collect for a long series of years, thereby foreclosing all ability of future councils to provide for public improvements, no matter how important they prove to be. We respectfully insist that the intention of the Legislature that the municipalities of this state should be limited and not unlimited in the amount of indebtedness they saddle upon the people of the state and that the people themselves should be given the right to vote when it is proposed to incur large indebtedness is of vastly more importance than the intention of the city council. In fact, the disposition of city councils to go the limit in incurring debts when unrestrained is exactly what the Legislature intended to prevent when granting the charter to the City of Gainesville.

There can be no doubt but that a decision by this court sustaining the validity of these warrants will practically annul all provisions in the charters of the cities and towns in this state which seek to require a vote of the people upon bond issues, because if the council can issue the same kind of securities without being authorized by a vote it would be foolish to go to the trouble and expense of holding an election.

## Judgment in Favor of Head Estate and Southern Surety Company.

Regardless of the result of the decision as between petitioner, the City of Gainesville, and the Brown-Crummer Investment Company, we believe that there can be no question but that the Court of Civil Appeals of Texas and the trial judge in this case correctly construed the obligation assumed by H. W. Head and the Surety Company, and the judgment in their favor must be affirmed. The instruments signed by Mr. Head are copied on pages 1 and 2 of this brief. The important clause in those instruments is in these words: "*None of said moneys, proceeds of the warrants, will be paid or credited to Southern Construction Company except in such amounts as may be shown to be due under signature of mayor of Gainesville, Texas, and when such amounts shall equal* $10,000.00 (*in one case and* $37,000.00 *in the other*), *then this obligation to be discharged.*"

The city construed said instruments as making Head the surety of the Construction Company for the performance of the work, and based this suit upon that theory, and there is no pleading upon which a recovery could be had against Head upon any other theory, while Head construed the instruments as constituting him the custodian or stakeholder of the warrants, and that by the very terms of the instruments his obligation to the city with reference to the warrants and their proceeds was discharged when he received the stipulated notice from the mayor, and after receipt of such notice his obligation was to the Southern Construction Company. And both the Court of Civil Appeals of Texas and

Judge Estes adopted this view, and we think that in this they were manifestly correct. If the city thought there were any facts which called upon Head to withhold from the Construction Company the proceeds of the warrants after he received the stipulated notice from the mayor and council, it should have alleged and proved them. The burden was upon it to do this. We therefore confidently ask that the judgment in favor of H. O. Head, executor, and the Southern Surety Company, be affirmed regardless of the disposition of the case between the city and Brown-Crummer Investment Company. We understand this to be the approved practice in the federal courts.

See *National Surety Co.* v. *U. S.*, 228 Fed. 517; *Chiarello Bros.* v. *Pederson*, 242 Fed. 488; *Albright* v. *McTighe*, 49 Fed. 872.

F. C. Dillard,
Rice Maxey,
*Attorneys for Respondent H. O. Head, Executor.*

H. O. Head, Executor,
*For Himself.*

F. C. Dillard,
*of Counsel.*

## APPENDIX.

Since Sections 7 and 9 of Art. II of the Gainesville charter are referred to in illustrating the point that Sec. 3 of Art. II does not authorize the issuance of the alleged warrants, said Sections 7 and 9 are here copied, as follows:

"Sec. 7. To Regulate Street and all Railway Companies. The City of Gainesville shall have the power by ordinance or otherwise to regulate the speed of engines, locomotives, car, street cars and railway trains within the corporate limits of Gainesville, and to require all railways and street railway companies to keep the streets over which their line or lines may run properly drained, and to light the same wherever deemed by the city necessary, and to require all railway and street railway companies to construct and keep in repair from curb to curb, bridges and crossing over all the ditches dug by said companies, or natural drains, waterways and openings over which the lines of said companies are run, and to construct and maintain drain and culverts where crossed by any line of said railways on all streets over which they run; to direct and control the laying and construction of railroad tracks, turnouts and switches, and to regulate the grade of same, and to require them to conform to the grade of the streets of said city as they may be or are now established, and that said tracks, turnouts and switches be so constructed and laid out as to interfere as little as possible with the ordinary travel in the use of the streets.

"Sec. 9. Lien for Improvement. The City of Gainesville shall have power by ordinance or otherwise to require all railway companies to pay the cost of grading, paving, repairing or repaving or

otherwise improving that part of the street or streets or intersections thereof within the city used or occupied by said companies and such cost shall be a lien upon the property and franchises of such companies. The portion of the street occupied by a street railway company shall be deemed to be the space between its tracks and twelve inches on the outside of its rails, and all space between its double tracks, turnouts and switches."

The charter, except some amendments which it is not necessary to now notice, is found in the Special Laws of the Thirty-first Texas Legislature approved March 17th, 1909, and is set forth in 14th Gammel's Laws of Texas, pages 501 to 543 of the laws of that year. Gammel's laws are not differently paged.

FILED
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CHARLES ELMORE CROPL
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No. 433

# In the Supreme Court of the United States

OCTOBER TERM, 1927.

CITY OF GAINESVILLE, PETITIONER,

VS.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY AND H. O. HEAD, EXECUTOR OF H. W. HEAD'S WILL, RESPONDENTS.

## BRIEF FOR SOUTHERN SURETY COMPANY ONE OF THE RESPONDENTS

J. L. PARRISH,
of Des Moines, Iowa,
Attorney for Respondent.

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## BRIEF FOR SOUTHERN SURETY COMPANY ONE OF THE RESPONDENTS

Insofar as the brief of petitioner and that of respondent H. O. Head, executor, attacks the validity of the warrants in question, and supports the proposition that the suit in its entirety and not the separable controversy only was removed to the United States District Court, Southern Surety Company, a respondent, adopts the same in its behalf. Insofar as the brief of H. O. Head, respondent, attacks the right of the city to recover, or in any event to recover against either respondent, said respondent adopts the brief of its said co-respondent, H. O. Head, executor.

With respect to the brief filed in behalf of the City of Gainesville, petitioner, this respondent makes the following comments:

On page 5 reference is made to some understanding without a statement as to what parties participated in reaching such understanding. It might be inferred that H. W. Head was a party to this understanding, but there is no evidence whatever that he participated in or even had any knowledge of same until his activities as escrow agent or financier were invoked later.

On page 6 of the brief the statement is made that this respondent guaranteed two obligations for H. W. Head. This statement is contradicted by the record which discloses that the only obligations executed by this respondent in behalf of H. W. Head related to an agreement dated September 10, 1920, this respondent's obilgations being dated September 20, 1920. (R. page 13-16-17).

In some instances reference is made in the brief to Southern Surety Company when obviously Southern Construction Company is intended.

**H. W. Head fully discharged his obligation and the judgment in favor of himself and his surety should be affirmed.**

Head's undertaking appears in full in the record and is correctly quoted on pages 5-6 of petitioner's brief. After referring to the preceding events and the intention of the parties with respect to the issuance of the warrants, and the agreement to indemnify the city to the extent named, it is recited:

> "None of said money will be paid or credited to Southern Const. Co., except in such amounts as may be shown to be due under signature of Mayor of Gainesville, Texas, and when such amounts shall equal ten thousand dollars then this obligation to be discharged."

The undisputed record shows in the most definite and certain manner that H. W. Head lived up to the letter of his agreement and did exactly what he promised to do. In due course, the city council of the city of Gainesville audited and allowed claims of the Southern Construction Company in varying amounts, being the same amounts as the warrants turned over by Head to the Construction Company. (R., p. 167, et. seq.). These proceedings by the council were certified under the signature of the mayor and the city secretary and the corporate seal. They were further supported by the individual affidavits of the mayor, aldermen and city secretary to the effect that the statements recited in the councilmanic proceedings were true; that the material had been furnished and the work had been done, and same had been inspected and accepted and found to be in accordance with the contract and worth the price agreed to be paid therefor. This procedure was followed with respect to each warrant in question. (R., p. 252, et. seq.)

It is plainly apparent that these entire proceedings came into the hands of H. W. Head before a single warrant was surrendered. The money for the warrants was collected through H. W. Head by means of drafts drawn by him on the Brown-Crummer Investment Company. The warrants, the certified record of the councilmanic procedure and the cumulative verifying affidavits were attached, all of which discloses in the clearest possible manner that

this record was furnished Head and on the faith of it he made the drafts, attached same, and forwarded the drafts for collection. (R., p. 191, et. seq. and p. 258, et. seq.).

H. W. Head agreed that he would not pay or credit the Southern Construction Company except in such amounts as were shown to be due under the signature of the mayor, and that when such amounts equaled ten thousand dollars in one case and thirty-seven thousand dollars in the other case, his obligation should be discharged. The record shows beyond any possibility of debate that he was furnished a statement under the signature of the mayor, and amply supported otherwise, for that matter, that the amounts of warrants delivered by him represented amounts so shown to be due and his obligations were at an end.

If the record referred to had been wholly fabricated, there is not a suggestion of any knowledge of that fact on the part of H. W. Head, and the city should not be heard to assert a liability against him on account of actions taken by him by virtue of the very authority upon which he must depend and in obedience to which he agreed to act.

City of Laredo v. Frishmuth, 196 S. W., 190.
City of Marshall v. Elgin, 143 S. W., 670.
Colonial, etc., v. U. S. Mort. Co., 45 S. W., 623.
Halsell v. Ferguson, 202 S. W., 317, (Tex. Sup.)

This respondent respectfully prays that as to it and its co-respondent, the judgment of the trial court be in all things affirmed.

J. L. PARRISH,
Attorney for Respondent
Southern Surety Company.

# SUPREME COURT OF THE UNITED STATES.

No. 433.—October Term, 1927.

City of Gainesville, Petitioner,
*vs.*
Brown-Crummer Investment Company, Southern Surety Company, and H. O. Head, Executor of H. W. Head.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 14, 1928.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This suit was begun by the City of Gainesville, Texas, in a State Court of Texas against the Southern Construction Company, a partnership consisting of Harry D. Levy and Lester Levy, and against H. W. Head and the Southern Surety Company, all of whom were citizens of Texas, except the Surety Company, which was an Iowa corporation. The action grew out of a contract between the city and the Southern Construction Company for street improvements. The city issued city time warrants payable to bearer to pay the contractor. The contract was partly executed and the improvements partly constructed. A second contract was then made by which some of the warrants were to be issued before the rest of the work was done and were to be placed in escrow to be delivered to the contracting company as the work should be completed and approved. The performance of the escrow conditions was guaranteed to the city by H. W. Head and the Southern Surety Company of Iowa became his surety on this guaranty.

There is in the record a signed stipulation of the parties descriptive of the details of the proceedings, which in part is as follows:

"Default judgment in said cause was rendered by said court in favor of the plaintiff against all defendants for $15,000.00 and against the Southern Construction Company for $4,090, which judgment upon appeal by said Head and said Southern Surety Company was reversed by the Court of Civil Appeals for the Sixth Supreme Judicial District as to said Head and said Southern Surety Company, but was affirmed as to said Southern Con-

struction Company. See *Head* v. *City of Gainesville*, 254 S. W. 323. Upon the remand of said cause to the District Court for Cooke County, H. O. Head, as executor, made himself a party in lieu of H. W. Head, who had died in the meantime and he and the Southern Surety Company filed an answer to the petition. Thereupon, the plaintiff amended its petition making Brown-Crummer Investment Company, a Kansas corporation, a party defendant, and said Brown-Crummer Investment Company within the time allowed by law filed its petition to remove said cause to this court [*i. e.* the United States District Court for the Eastern District of Texas] upon the ground of a separable controversy. After a transcript of the proceedings were filed in this court, a motion to remand made by the plaintiff was overruled. All parties having repleaded in this court with the exception of the Southern Construction Company, which did not appear, it is agreed that the transcript of the proceedings in the district court as well as all abandoned pleadings may be omitted by the clerk in making out the record for the circuit court of appeals, as immaterial."

The Brown-Crummer Company was made a party by the city on the ground that it had in its possession $15,000 of the city warrants which the city did not owe because the paving contract had not been completed. The city sought to have them delivered up to be cancelled to prevent their sale to a bona fide purchaser. The Company was a dealer in municipal securities at Wichita, Kansas, and claimed to be owner as bona fide purchaser of the warrants, and when made a party sought judgment on them in this case against the city. It is upon the validity of those warrants that the chief issue in the case turns.

Upon the removal of this cause from the State to the Federal court, the defendant Head sought to avoid liability, on his guaranty to return $15,000 of warrants of the city, and that of his surety, the Southern Surety Company, by the contention that the warrants in question were illegally issued, void under state law and of no value. In all its petitions but the last, the city had alleged that its warrants were valid. In its later pleading, however, it changed its attitude somewhat and pleaded in the alternative that if the court should hold the warrants void, they should as against the Brown-Crummer Company be so declared and asked that they be cancelled.

Both the issue between the city and the Brown-Crummer Company on the warrants and that between the city and Head and the Iowa Surety Company for breach of their guaranty were tried to a jury in the district court. The court directed a verdict on the

warrants in favor of the Brown-Crummer Company and gave judgment against the city for $13,125 with interest. On the claim of the city under the guaranty against Head and the Surety Company, the court directed a verdict for the defendants and gave judgment of dismissal against the city.

The case was carried to the Circuit Court of Appeals of the Fifth Circuit. That court in its opinion dealt at some length with the questions whether the city warrants were valid under the state law and whether they were held by Brown-Crummer Company as a bona fide purchaser without notice of any infirmity in their origin. The Court of Appeals held the warrants legal and adjudged that the city was estopped as against the company to plead irregularities in their issue. The court therefore found no reversible error in the directed verdict in favor of the Brown-Crummer Investment Company. To that extent the judgment was affirmed.

The Court of Appeals dealt with the judgment in favor of the executor Head and the Surety Company against the city, which the city had sought to review and seeks to review here, by remanding it to the district court with instructions to dismiss the proceedings as between the parties.

Objection is first made by the petitioner that there was no separable controversy and so no jurisdiction. This question does not seem to have been presented to and was certainly not considered by the Circuit Court of Appeals. By the stipulation made in the Federal district court below, the transcript of the proceedings in the State district court from which the removal was had, as well as all abandoned pleadings, were omitted by the clerk in making out the record for the Circuit Court of Appeals as immaterial. The petition for removal from the State court to the Federal court is not shown, nor is the motion to remand. There was repleading by all the parties after the motion to remand was overruled. The stipulation, therefore, would seem to constitute an acquiescence in the removal and indicates that the jurisdiction had been conceded by all parties, and that the question had been abandoned until it is now renewed in the briefs in this Court. Of course a question of jurisdiction can not be waived. Jurisdiction should affirmatively appear, and the question may be raised at any time. *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 283; *M. C. & L. M. Railway Co.* v. *Swan*, 111 U. S. 379, 382; *Mattingly* v. *Northwestern Virginia Railroad Co.*, 158 U. S. 53, 56, 57. Yet the action

of the party in acquiescing may strengthen inferences of necessary facts from the record to sustain the jurisdiction, in the absence of a showing to the contrary. It sufficiently appears here that the controversy between the Brown-Crummer Company of Kansas and the city was as to the validity of the warrants and as to the ownership by that company of them and their acquisition by that company as a bona fide purchaser for value without notice. This was a controversy wholly between citizens of different states which could be fully determined as between them. The question of the guaranty as between the city and Head's estate and the surety on the guaranty needed not to be considered or determined in that controversy and had no bearing on it. The jurisdiction is sufficiently clear.

A further objection is made that the Circuit Court of Appeals erred in not deciding the issue made as between the city and the executor, Head, and the Surety Company, and in remanding it with directions to dismiss it. This objection is more serious. The necessary effect of the removal on such a ground was to remove the whole suit. This brought it all before the district court, and the Circuit Court of Appeals for complete disposition.

By the Act of July 27, 1866 (c. 288, 14 St. 306), a defendant of a different state from that of the plaintiff was enabled to remove a separable controversy between them, leaving the plaintiff, if he so desired, to proceed in the state court against the other defendant or defendants on the other issues. But later came the Act of March 3, 1875 (c. 137, 18 St. pt. 3, p. 470) the language of which was repeated in the present section 28 of the Judicial Code, and with minor changes is now the law. (See 36 St. 1094.) It provides that "when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the district court of the United States for the proper district". In *Barney* v. *Latham*, 103 U. S. 205, 211, this Court held that in distinction from the removal provided in the Act of 1866, the Act of 1875 removed the whole case to the Federal court for judgment. This conclusion was confirmed in *Brooks* v. *Clark*, 119 U. S. 502, 512, and in *Torrence* v. *Shedd*, 144 U. S. 527, 530. The rule estabished by these cases has never been varied or questioned.

It was the duty, therefore, of the Circuit Court of Appeals to consider the other issue in this case, which it erroneously remanded to the lower court to be dismissed. We must then reverse the judgment and send the cause back to the Circuit Court of Appeals for further proceedings.

It may be suggested that we might consider the correctness of the judgment against the city in favor of the Brown-Crummer Company on the city warrants and decide that. We have been advised by counsel that a case involving the validity of such warrants under the state law is now pending in the Texas Supreme Court and that the Circuit Court of Appeals should have the benefit of that decision before passing on the question.

Without intimating that the decision of the Texas court on the question of city warrants will be controlling under the circumstances of this case, we deem it better to remand the whole case to the Circuit Court of Appeals for further proceedings and complete disposition.

*Reversed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*